CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

North-Carolina.

JULY TERM, 1811.

Clarke
v.
Wells's administrator. } Case agreed from Burke.

After an injunction is dissolved, and the bill continued as an original bill, the Court will order the money recovered at Law to be retained by the Master, until the Plaintiff at Law give security to perform the decree which may be made at the hearing, where it appears to the Court that the Plaintiff is insolvent, or is likely to become so, or resides out of the State.

A suit at Law was commenced in Rutherford County Court, in the name of Wells's administrator to the use of James L. Terril, against Clarke, upon a promissory note, and judgment was obtained for the sum of £——. Clarke appealed, and in the Superior Court, judgment was again rendered for the Plaintiff. Clarke filed a bill in Equity, and procured an injunction to stay further proceedings upon the judgment at Law. To this bill, the Defendant put in a special demurrer, which was overruled by the Court, and the Defendant then filed his answer. Upon the hearing of the bill and answer, the

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injunction was dissolved, and Complainant prayed that his bill might stand over as an original bill. At the succeeding Term, the money to satisfy the judgment at Law having been levied, Complainant moved the Court for an order, that the Clark of Rutherford Superior Court, into whose hands the money so levied had been paid, should retain the money until the final determination of this suit, unless the Defendant should give bond with good and sufficient securities, to perform the decree which the Court should make upon the final hearing of the cause. This motion was founded upon an affidavit made by Complainant, stating the insolvency of James L. Terril, who had the beneficial interest in the judgment at Law, and who was the sole administrator of Wells; and this affidavit was supported by the return of "no goods," endorsed by the Sheriff on three executions that had issued from the Court of said county against the said Terril. It is submitted to the Supreme Court to decide, Whether this motion ought to be allowed?

R. Williamson and *J. Pickens* for Complainant. *T. Coxe* and *M. Troy*, for Defendant.

LOCKE, Judge, delivered the opinion of the Court:

The Court of Equity has the power to make the order moved for by the Complainant in this case: but this power ought to be exercised, only in cases where, without such interference, justice could not be effected. As, where the Plaintiff at Law is, or probably will be insolvent at or before the final decision of the cause in Equity; or where he resides out of the State, and at such a distance as to expose the party prevailing, to great trouble, expense, and inconvenience, in getting back his money. Indeed, without such a power in a Court of Equity, it could not afford that remedy which induces men to seek redress in that Court. A Plaintiff (who may be insolvent) obtains a judgment at Law, against a man who has no legal, but a good equitable defence;

to avail himself of this defence, he procures a bill of injunction; but the Plaintiff at Law has a conscience hardy enough to deny all the equitable matter contained in the Complainant's bill, and on the hearing, the injunction is dissolved. The Complainant, conscious, however, that he can prove the facts upon which his claim to relief is founded, continues over his bill as an original, procures his testimony, and on the final hearing of the cause, obtains a decree in his favor. But in the mean time, the Plaintiff at Law has received a satisfaction of his judgment, is utterly insolvent, and beyond the reach of the Court. Of what avail to the Complainant is the mere decree of the Court? The remedy, which he has been seeking for years, turns out to be merely nominal: it yields him nothing. To prevent this evil, the Court of Equity will exercise the power of making such an order as that now moved for; and it appears to the Court that the facts contained in Complainant's affidavit are sufficient to authorise the exercise of this power in the present case. Let the motion be allowed, and the money retained by the Clerk, until bond with good security be given to refund the money in the event of a decree being made to that effect.

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Adm'r of Cross
v.
Terlington.
} Case agreed from Sampson County.

A, being the next kin of B, conveys the personal property of which B. died possessed, to C, who takes out letters of administration on the estate of B. and afterwards procures the conveyance to be proved and registered. A. brings an action of trover against C. for the property, alleging that the conveyance had been fraudulently procured. Upon the trial, the Jury find that the conveyance had been fraudulently procured, and is void: but C. insists that A, having brought an action at Law, must shew a legal title, and this can be done only by shewing the assent of C, that he should have the property; for until this assent be given, the legal title is in C. as administrator. Held, that C. having recognized the title of A. before administration granted, by accepting the conveyance, and having recognized it after administration granted, by procuring the conveyance to be proved and registered, he has thereby acknowledged A's right, and given such assent as vests the legal title in A.

An administrator cannot bring trover for a chattel, after his consent that Defendant shall have it, before administration granted.

This was an action of trover for a number of negroes, mentioned in the Plaintiff's declaration. On the trial, the following facts appeared in evidence.

Laban Taylo died in the year 1800, possessed of the aforesaid negroes, intestate, and without issue, and without brothers, or sisters, or the children of such; leaving no father, but a mother, who became entitled to the negroes in question. In January, 1804, and before any administration was taken out upon the estate of Laban Taylo, Abigail Taylo, his mother, conveyed to Phelicia Terlington, wife of the Defendant, the aforesaid negroes, by an instrument of writing, in the following words, to-wit:

"STATE OF NORTH-CAROLINA,
SAMPSON COUNTY.

"Know all men by these presents, that, whereas my son Laban Taylo, Esq. late of the county of Sampson, deceased, hath lately died intestate, being possessed, at the time of his death, of very consider-

ble personal estate, consisting of sundry negro slaves, to-wit: Moses, Washington, John, Daniel, Nan, and her two children; Annes, and her child; also a considerable stock of different kinds, household furniture, and other chattels; and whereas, although no administration has yet been granted of the goods and chattels of which the said Laban Taylo was possessed at the time of his decease, nevertheless, for, and in consideration of, the natural love and affection I have towards my beloved sister Phelicia Terlington, wife of Southey Terlington, and in consideration also of the sum of five shillings, by the said Phelicia to me in hand paid before the ensealing of these presents, I have granted, bargained, and set over, and by these presents do grant, bargain, and set over, unto the said Phelicia Terlington, all and singular, the personal property aforesaid, and all and singular, all and every personal property of every kind and nature whatsoever, of which the said Laban Taylo died possessed, and to which I am or may be entitled, under the several acts of Assembly of the State aforesaid, for the distribution of intestate estates: and this deed I am actuated to execute, from a belief that it will tend to the true benefit of myself, and of those whom the laws of God and my country have decreed should benefit by my property. Witness my hand and seal, this 31st January, 1804.

her
ABIGAIL ⋈ TAYLO, (SEAL.)
mark.

"Signed, sealed, and delivered, in presence of

"JONATHAN FRYER,
"JOSHUA BASS.

"Sampson County—August Term, 1804. Then was the within proven in open Court, by the oath of Joshua Bass. Ordered, &c.—Hardy Holmes, Clerk."

It was in evidence that the said Southey Terlington procured the above recited conveyance from said Abigail Taylo, and was present when she executed it. In February, 1804, letters of administration upon the estate of Laban Taylo, were granted to the said Phelicia Terlington; and shortly after this, the above named Abigail Taylo, intermarried with Jonathan Cross, who afterwards died; and the present Plaintiff administered upon his estate. The Jury found that the negroes had so been in the possession of Jonathan Cross and his wife, during the coverture, as to enable him, in his own name, or his administrator after his death, to prosecute and main-

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tain a suit; and the Jury further found, that the above recited deed of conveyance was void, having been obtained by fraud and misrepresentation; and gave a verdict for the Plaintiff.

There was no evidence of any assent on the part of the administratrix of Laban Taylo, that Jonathan Cross, or his wife, should take the negroes, so as to vest a *legal right* in them, or either of them, except what appeared upon the above recited deed of gift; and the question reserved for the opinion of the Supreme Court was, Whether the before recited deed be not such evidence of assent on the part of the Defendant and his wife, that the legal interest in the negroes vested in Abigail Taylo: That after administration, the Defendant cannot retract and claim the property as administratrix, upon the ground that no assent had been given?

Jocelyn for Plaintiff; *Sampson* for Defendant.

Jocelyn for the Plaintiff.—The question presented to the Court for its opinion, is, Whether there has been such an assent on the part of the administratrix of Laban Taylo, as to vest the legal estate in Mrs. Cross?

It is true, the deed of conveyance was delivered before the Defendant's wife obtained letters of administration. Had she administered previous to this transaction, it is believed, no doubt could remain upon the subject.

If an executor *purchase* the legacy from the legatee, or even *offer* him money for it, this amounts to an assent—*Martin's (Toller's) Ex'rs, page* 201, *and the authorities in the margin.* Mrs. Terlington received the deed of conveyance on the last day of January, 1804; by this she admitted the property to be in Mrs. Cross, and assented to her possession. A few days afterwards she administered. Did she, after administration, do any act, which, in law amounted to an assent? It is believed she did. For after administration she acted upon the deed in such a manner as to prove that she still considered the ne-

groes in Mrs. Cross's possession, and that she had assented to such possession; for, six months after administration, (see the deed,) in August, 1804, she applied to Court and had the deed proved and recorded; and it is believed, that upon the principle of implied assent, which the law recognises, she as completely gave this assent, after administration, by relying upon the validity of this conveyance, and proceeding to act upon it, as if she had taken the deed after administration.

And it is to be observed, that this instrument is not a mere release, which might be considered as surrendering up a doubtful claim; but it is a complete deed of bargain and sale, for a good and valuable consideration, in which the administratrix of Laban Taylo unequivocally acknowledges the property and legal estate to be in Mrs. Cross. And the Plaintiff cannot, without some difficulty, be persuaded that, after this admission and this assent, the Defendant should be permitted to avail himself of a mere technical objection, and retain the property for the administratrix, when, after administration, she relied and acted upon a deed, which, upon every principle, is evidence of an assent.

It is true, that the next of kin cannot take to himself a distributive share without the assent of the administrator, because the administrator is not compelled to deliver it up; he is entitled to retain, unless a bond is given as a security against future claims. But if the administrator does assent without bond and security, his legal remedy is gone, and the next of kin will hold the property, not only against him, but also against creditors, except in equity.

In this case, it is contended, that such assent was given, by implication of law, without requiring either bond or security.

It is further to be remarked, that the question is not, whether Mrs. Cross had possession of the negroes during coverture, so as to vest a right in Jonathan Cross,

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her husband; because that is settled by the Jury, who found expressly, that she was so possessed; but, whether an express or implied assent had been given,

LOCKE, Judge, delivered the opinion of the Court:

It is true, that a legatee or person entitled to a distributive share, cannot legally get possession thereof without the assent of the executor or administrator, either express or implied; but slight declarations of the executor or administrator, as well as many acts, will in Law, amount to such assent. In 1 *Com. Dig.* 342, (*C. C.*) it is said, if an executor take a grant, lease, &c. from the legatee of the thing or term bequeathed, it will amount to an assent. To this effect also is 10 *Co.* 52-6—*Office of Executors*, 322-3. Or if he offer money to the legatee for the purchase, or send another to the legatee to purchase it of him—1 *Com. Dig.* 342. These and many other acts of the executor will amount to an assent.

This case states, that Abigail Taylo, the person by law entitled to the estate of Laban Taylo, deceased, did execute a deed to Phelicia Terlington for the negroes in question; but that at the time said deed was executed, no letters of administration had been granted, and that afterwards, the said Phelicia obtained letters of administration on said estate. The authorities above recited, would be sufficient to shew the assent of the administratrix, and to vest the property in the person entitled to the distributive share of said estate, if Phelicia, at the time of taking the deed, had been the administratrix. But it is said she was not, and of course, that her attempt to purchase and acquire title by this deed, ought not to bind the administratrix. *Whitehall* v. *Squire*, (1 *Salk.* 296,) is a case where a person, before administration granted, agreed that the Defendant being in possession of a horse, belonging to the estate of the deceased might keep him, in satisfaction of funeral charges; and afterwards having taken out administration, he

brought an action of trover to recover the horse. The Court held that he was bound by his agreement, and judgment was rendered against the administrator by two of the Judges. It is true, a very learned Judge thought otherwise, and on this case, differed from his brethren. If then, this case should be considered as Law, it is decisive of this question; not that there was any express agreement on the part of Phelicia Terlington that Abigail Taylo should retain this property as her own; but because her receiving a deed of bargain and sale for a valuable consideration, was at once an admission and acknowledgment on her part, that Abigail Taylo was the true owner, and competent to convey the negroes in question. It is unnecessary to decide this case merely on this ground, in as much as Phelicia Terrington, after letters of administration were granted to her, to wit, in August, 1804, had this deed proved in the County Court of Sampson. If as administratrix, and against this deed, she intended to claim this property, why have the deed proved and recorded? it would strengthen the evidence against her claim. If she intended to claim under the deed, then probate thereof in the County Court was necessary to give to it validity It may therefore be fairly inferred from this act, that she admitted and believed the right of this property to have been once in Abigail Taylo; and by recording the deed, intended to confirm that right, and make her title under the deed good and valid. Is not this equivalent to obtaining the deed after administration granted? Or at least equal to sending a person to purchase the legacy from the legatee, which, as before mentioned, amounts to an assent? It is the opinion of the Court, that in this case there has been such an implied assent, as to vest the property in Abigail Taylo, and that judgment ought to be rendered for the Plaintiff.

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Green
v.
Ealman. } Case agreed from Nash.

A. appeals from the order of the County Court, granting leave to B. to build a mill, &c. The order of the County Court is affirmed; A. is liable for the costs in the Superior Court under the general law regulating appeals; B. is liable for the costs of the County Court under the act of 1779, ch. 23.

This was a petition for leave to build a mill, filed under the second section of the act of 1779, ch. 23.* Green, the petitioner, owning the land on one side of the run, and Ealman owning the land on the other side. Ealman having been summoned to answer the allegations of the petition, appeared, and prayed that leave to build the mill might be granted to him, and not to the petitioner Green. The County Court decreed that leave should be granted to Ealman to build the mill. From this decree of the County Court, the petitioner Green appealed to the Superior Court, and gave bond and security according to the act of Assembly regulating appeals. The Superior Court affirmed the decree of the

* "Sec. II. Be it further enacted, that any person willing to build "such mill, who hath land only on one side of a run, shall exhibit his "petition to the County Court, and therein shew who is the proprie- "tor on the opposite side of the run; whereupon a summons shall is- "sue to such proprietor to appear at the next Court, and answer the "allegations of such petition; and the Court also, at the same time, "shall order four honest freeholders to lay off, view, and value, on "oath, an acre of the land of such proprietor, and also an acre of land "of the petitioner opposite thereto, and to report their opinion and "proceedings thereon to the next Court, and thereupon the Court "shall order the said report to be recorded; and if it take not away "houses, orchards, gardens, or other immediate conveniences, said "Court shall and may, and are hereby empowered and authorised, to "grant leave to the petitioner, or such proprietor, to erect such mill, "at the place proposed, as in their discretion shall seem reasonable, "and to order the costs of such petition to be paid by the person to "whom such leave shall be granted."

County Court; and it was submitted to the Supreme Court to determine which of the said parties should pay the costs, and in what manner, and to what extent, if the costs be divisible.

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LOCKE, Judge, delivered the opinion of the Court:

The Legislature evidently intended, that as the party applying for an order to erect a mill, was to have a portion of his adversary's property condemned, to answer a public purpose as well as a private benefit to the party intending to erect such mill, this condemation and appropriation should be at the costs of the party making the application. Yet it would appear that this provision only extended to the costs of the County Court. If, therefore, a party against whom the County Court make the order, should appeal from that order to the Superior Court, he takes the appeal subject to the general law of the country regulating costs upon appeals. He will therefore be liable to, or exempt from the payment of those costs, according to the event of the suit; if it terminate in his favour, he will be exempted from costs; if otherwise, he must pay the costs. In the present case, the same party prevailed in both Courts; and therefore the party appealing is bound to pay the costs of the Superior Court, under the general law; and the party in whose favour the order was granted, is eqdally bound to pay the costs in the County Court, under the special act of Assembly, provided for that particular case.

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The heirs of Hill
v.
The heirs of Wilton } From Craven.

Colour of title.—A. constituted B. his attorney, "to levy, recover and receive all debts due to him, to take and use all due means for the recovering of the same; and for recoveries and receipts thereof, to make and execute acquittances and discharges." B. sold to C. a tract of land belonging to A. and conveyed the same *as Attorney of A.* C. entered and had seven years possession of the land. Held,

That the deed of B, as attorney of A. although he as attorney had no authority to sell the land, was colour of title, and that seven years possession under it barred the right of entry of A.

Where a deed is executed, which is afterwards considered as forming only a colour of title, the party executing it must be considered as not having a complete title to the land, which he, by his deed purports to convey.

This case was sent up to the Supreme Court from the Superior Court of Law for Craven County, upon a rule obtained by Defendants to shew cause why a new trial should not be granted. It was an action of ejectment, and the only question was, Whether the following letter of attorney from Peter Dubois to Vincent Aymette, and the deed from Aymette to Samuel Hill, do not make such a colour of title, that seven years possession under it will give a complete right?

"Know all men by these presents, that I, Peter Dubois, of the county of Bladen, and province of North Carolina, planter, have constituted, ordained and made, and in my place and stead put, and by these presents do constitute, ordain and make, and in my place and stead put my beloved friend, Mr. Vincent Aymette, planter, of the same province and county of Craven, to be my true, sufficient and lawful attorney, for me and in my name and stead and to my use, to ask, demand, levy, recover and receive of and from all and every person and persons whomsoever the same shall or may concern, all and singular sum and sums of money, debts, goods, wares, merchandize, effects and things whatsoever, and wheresoever they shall and may be found due, owing, payable, belonging and coming unto me the constituent, by any ways or means whatsoever, nothing excepted; giving and granting unto my said attorney, my whole strength, power and authority in and about the premises; and to take and use all due means, cause and process in

the Law for the recovering of the same; and of recoveries and receipts thereof, in my name to make, seal and execute, due acquittances and discharges; and for the premises to appear and the person of me the constituent to represent before any governor, judges, justices, officers, and ministers of the Law whatsoever, relating to the premises, with full power to make and substitute one or more attorneys under him my said attorney, and the same again at pleasure to revoke, and generally to say, do, act, transact, determine, accomplish and finish all matters and things whatsoever, relating to the premises, as fully, amply, and effectually, to all intents and purposes, as I the said constituent myself should, ought or might do personally, although the matter should require more special authority than is herein comprised; I the said constituent ratifying, allowing and holding firm and valid all and whatsoever my said attorney or his substitute shall lawfully do or cause to be done in and about the premises, by virtue of these presents. In witness whereof, I have hereunto set my hand and seal, the fifth day of April, Anno Domini one thousand seven hundred and sixty-four, in the fifth year of his Majesty's reign.

"PETER DUBOIS, (SEAL.)

"Signed, sealed and delivered in the presence of

"PETER AYMETTE,

"VINCENT his ✕ mark. AYMETTE.

"October Inferior Court, 1765—Present His Majesty's Justices.—Then was the within power of attorney proved in open Court by the oath of Vincent Aymette, evidence thereto, and ordered to be registered. Teste, PETER CONWAY, C. I. C.

The deed from Aymette to Samuel Hill was in the following words:

"This Indenture, made this 22d day of February, in the year of our Lord one thousand seven hundred and sixty-nine, between Vincent Aymette, sen. being attorney of Peter Dubois, authorised thereto by an instrument bearing date the fifth day of April, in the year of our Lord one thousand seven hundred and sixty-four, both principal and attorney of Craven county, and province of North-Carolina, planter, of the one part, and Samuel Hill, millwright, of the county and province aforesaid, of the other part, witnesseth, that the said Vincent Aymette, for and in consideration of the sum of six pounds, five shillings, proclamation money, to him in hand paid by the said Samuel Hill, before the sealing and delivery hereof, well and truly paid, the receipt whereof the said Vincent Aymette doth acknowledge, and hereof doth acquit and discharge the said Samuel Hill, his heirs, executors, administrators, and every of them, by these presents, hath granted, bargained and sold, and by these presents doth fully and absolutely grant, bar-

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gain and sell and confirm unto the said Samuel Hill, and his heirs and assigns, a certain tract or parcel of land, situate and being in Craven county and province aforesaid, on the west side of Crooked Run, beginning at Michael Shufus causeway, running thence south 70 degrees west 160 poles to a pine; thence south 20 east 640 poles to a black gum; thence north 20 east 160 poles; thence north 20 west 640 poles to the first station, as by patent granted to Peter Dubois in the year one thousand seven hundred and thirty-eight, reference being had thereto, may more fully appear: To have and to hold the aforesaid 640 acres of land, and every part or parcel thereof, unto the said Samuel Hill, his heirs and assigns forever, to their only proper use and behoof. Further, the said Vincent Aymette, so far as he is authorised by the power of attorney before mentioned, shall at any time, at the request and the proper charge of the aforesaid Samuel Hill, do any other act or assurance that may be requisite in law for the more fully transferring the fee-simple right of the premises aforementioned unto the aforesaid Samuel Hill, his heirs, executors or assigns, and the said Vincent Aymette doth warrant and defend the aforesaid premises from his heirs and every other person, so far as the letter of attorney before mentioned shall authorise him thereto, forever. In witness whereof, the said Vincent Aymette hath hereunto set his hand and seal.

VINCENT AYMETTE, (SEAL.)

"Signed, sealed and delivered in presence of
"PETER AYMETTE and VINCENT AYMETTE, jun."

"STATE OF NORTH-CAROLINA, } November Term, 1806.
JONES COUNTY COURT, }

"Then was the within deed proved in open Court by the oath of Samuel M'Daniel, sen. who swore that he was well acquainted with the hand-writing of Peter Aymette, one of the subscribing witnesses to the said deed, and that the name of said Peter Aymette thereunto subscribed as a witness, is in his own proper hand-writing, and that the said Peter Aymette, and also Vincent Aymette, the other subscribing witness, and Vincent Aymette the grantor, are all dead, and that possession of the lands thereby conveyed had gone with such conveyance; whereupon it was ordered that the said deed should be recorded.

(Signed) WILL. ORME, C. C.

"Registered in the Register's Office of Jones County, in book G. No. 7, and page 92, JAS. BRYAN, Reg'r.

Gaston, in support of the rule.—The letter of attorney from Dubois to Aymette, in no part authorizes Aymette to sell lands: Hill, the purchaser, had therefore fair notice that he was taking a deed from a man who claimed no interest in the lands himself, and who had no power to sell them. A deed that constitutes colour of title,

must purport on its face to be made by a person competent in law to convey the lands, and must be received by the bargainee as a good and valid conveyance: the transaction on his part must be *bona fide*. If at the time he receives the deed, he has notice that the title to the lands is not in the bargainor, but in a third person, he commits a fraud in receiving the deed, which fraud vitiates the conveyance, and renders his possession, however long it may be continued, of no avail. In this case, Hill must have known that Aymette had no power to sell the lands, and receiving a deed from him with this knowledge, he was guilty of a fraud which rendered his deed null and void to every intent and purpose.

Harris, contra.—Colour of title is required, 1st. To shew the extent of the possession: 2dly. The estate claimed by the person in possession; and 3dly. To give notoriety to others of his claim. Colour of title is not a good title, otherwise seven years possession under it would not be required to make it good. Any deed, which upon its face purports to be a conveyance from one man to another, is colour of title; and it is not necessary that the bargainee should receive it under the belief that he thereby acquired a valid title; for the act of 1715, ch. 27, sec. 2d, considers many deeds as constituting colour of title, which upon their face purport to be made by persons who had no title; such as deeds made by "creditors, executors and administrators, husbands in right of their wives, &c." Although the second section of this act has been considered as only retrospective in its operation, and the third as prospective, it is certain that the doctrine of colour of title was borrowed from the second section; and we are to look to that to see what the legislature intended should be such colourable title as will protect a seven years possession of land. It is admitted, that the transaction must be *bona fide* on the part of the bargainee, and that fraud will

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vitiate his deed so that it shall not protect his possession. But in the present case, there is no ground to presume fraud in Hill: the circumstances of the case shew the fairness of the transaction; that Aymette believed he had power to sell and convey the lands; that Hill received the deed under this belief; and as the possession of the land has gone with the deed, it is fair to presume that Dubois himself believed Aymette was empowered, by his letter of attorney, to make the sale and conveyance. Most men, not skilled in the law, would construe this letter of attorney in the same way.

HALL, Judge, delivered the opinion of the Court:

The case admits that the lessors of the Plaintiff have had seven years possession of the lands in dispute, under Vincent Aymette's deed; that this deed was executed, as its states upon its face, in consequence of a power of attorney given to Aymette by Peter Dubois. It is insisted, that although it is so stated in the deed, yet upon inspecting the power of attorney, it appears that no authority is thereby given to sell and convey lands: that as Aymette admits in the deed that he had no right to the lands himself, and claimed only an authority to sell and convey as aforesaid, his deed to Hill did not amount even to colour of title. It is true that Aymette was not authorised to sell the lands by Dubois's power of attorney; and if the question depended upon "who had the title at the time of the conveyance," there could be no doubt. But the lessors of the Plaintiff have been in possession for the space of seven years, since that time, under Aymette's deed, and no good reason appears to the Court why that deed should not be considered a colour of title. Whenever a deed is executed, which afterwards is considered as forming only a colour of title, the party executing it must be considered as not having a complete title to the land, which he by his deed purports to convey: it is a common thing for a person

who sells land, to allege that he has a title to it by descent, or in some other way; or, as in the present case, that he is empowered to sell it under an authority given to him by the true owner. It is not probable that the purchaser would doubt the truth of this allegation, more in the one case than in the other; and in either case, when such purchaser remains in possession for the space of seven years, he ought to be protected. Aymette's deed is of itself sufficient colour of title, and its validity, in that respect, should not be affected by any contradiction that exists between it and the power of attorney executed by Dubois. The lessors of the Plaintiff stand upon as meritorious ground as if Aymette had sold the lands in question to Hill as his own. Let the rule for a new trial be discharged.

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Long v. Long.

Rebecca and Mary Long
v.
Lunsford Long's Ex'r.

A, by his marriage with B, acquired sundry negro slaves in 1794. B. had issue, two daughters, and died. In 1809, A. died, having made his will, and bequeathed to his two daughters "all his negroes, together with their *future* increase, which came by his wife B." The two daughters claimed of the executor, not only the increase *after* the death of the testator, but also the increase from the time the negroes came into A's possession. Held,

That the daughters were entitled under the will to *all* the increase of the negroes, from the time they came into A's possession.

This was a petition filed in the Superior Court of Law for Halifax County, and the facts therein set forth, so far as the same are necessary to illustrate the point sent up to the Court, were as follows:

In the year 1794, Lunsford Long married Rebecca Jones, by whom he had issue, the petitioners Rebecca Long and Mary Long. At the marriage, the father of

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Rebecca Jones gave to his son-in-law a number of negro slaves. In 1798, Rebecca, the wife, died; and sometime afterwards, Long married a second wife, by whom he had several children living at his death. In 1809, Long died, having previously published in writing his last will and testament, which after his death was duly proved: and in the said will he bequeathed as follows, to-wit: "I give and devise to my daughter Rebecca Jones Long and Mary Rebecca Allen Long, all my negroes, together with their future increase, which came by my dear departed Rebecca, their mother, (except Frank Bibb, whom I wish to liberate on account of his meritorious services, and request my executors to attend to his manumission,) to them, their heirs and assigns, forever." He appointed Allen Jones Green testamentary guardian to the petitioners, and Lemuel Long executor of his will, who delivered over to the said guardian the negroes which his testator had received from his father-in-law at the time of his first marriage, but refused to deliver over those negroes "*which had been born of that stock since his testator received them*;" alleging that they were to be divided, with the testator's other negroes, between the widow and younger children, under the next clause of the will, which is in the following words: "I give and devise all the rest and residue of my negroes, together with their future increase, to my beloved wife, Mary Long, my daughter, Mary M'Kinney Long, my sons, Benjamin Sherwood Long and William Lunsford Long, share and share alike." This petition was filed against the executor, for the increase of the negroes from the time of the testator's first marriage, till his death. To this petition the executor demurred, and the petitioners having joined in demurrer, the case was sent up to the Supreme Court upon the question, Whether the petitioners were entitled to the increase of the negroes as aforesaid.

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Long v. Long.

HALL, Judge, delivered the opinion of the Court:

The clause of the will under which the petitioners claim the increase of the negroes in question is a little doubtful as to its meaning. The testator speaks of "all his negroes, together with their future increase, which came by his dear departed Rebecca, their mother." It appears to the Court, that it was the intention of the testator, by this clause in his will, to give to the petitioners the increase of the negroes which came by his wife Rebecca. The expression used by the testator, will be understood in common parlance, as comprehending the increase: he speaks of the negroes *generally*, as stock, without particularizing them by name; which circumstance is favorable to the idea, that as stock is to be diminished by deaths, so it must be kept up and supported by its natural increase. In this view of the case, the words *future increase*, it is true, are to be considered as useless. If, however, they are referable in point of time, to such increase as happened after the testator became possessed of the original stock, (and in this sense the testator seems to have used them) the words of the clause may well stand. This construction is aided by the consideration, that it appears from the will to have been the testator's intention to give to the petitioners every thing that he became possessed of in consequence of his intermarriage with their mother. Let the demurrer be overruled.

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The Chairman of the Court
v.
Moore's administrator and others.
} From Hertford.

An action can be maintained on an administration bond, against the securities, before judgment has been obtained against the administrator. An action lies against the securities as soon as the administrator forfeits his bond, and a person be thereby "*injured*," for The act of 1791, ch. 10, directs, that administration bonds shall be made payable to the Chairman of the County Court and his successors in office, &c. and shall be put in suit in the name of the Chairman, at the instance of the person injured.

This case was sent up to this Court from the Superior Court of Law for Hertford County, upon a rule obtained by the Plaintiff to shew cause why a new trial should not be granted. The action was brought upon an administration bond, against Eli Moore, administrator of the estate of Willis Moore, deceased, and against his securities; and the question submitted to this Court was, whether an action can be maintained on an administration bond, against the securities of the administrator, before a judgment has been obtained against the administrator himself?

HALL, Judge, delivered the opinion of the Court:

The act of 1715, ch. 48, directs that all administration bonds shall be made payable to the Governor, &c. who is directed to transfer or assign them '*to any person injured*,' who may maintain an action thereon. No part of the act seems to require that the person injured should prove his injury by the record of a judgment obtained by him against the administrator. Although the administrator might have forfeited his bond, yet the Plaintiff was not entitled to recover any thing of his securities, unless proof was made, according to the act, that he the Plaintiff was *a person injured*. The act of 1791, ch. 10, directs, that in future, administration bonds shall be

made payable to the Chairman of the County Court and his successors in office, &c. and shall be put in suit in the name of the Chairman, at the instance of the *person injured*. Under this act, (and the bond in question was given since this act passed) no recovery can be had in the name of the Chairman, unless, in addition to the proof that the administrator has forfeited his bond, proof is also made, that the party for whose benefit the suit is brought, has been injured by such forfeiture. It is contended, however, that this should be shewn by obtaining judgment against the administrator: if so, it will follow, that this judgment would be good evidence against, and obligatory upon the securities, although it be a proceeding "*inter alios acta*;" and the Defendants, if permitted, might have it in their power to shew that the real Plaintiff had sustained no injury. Upon this point the Court gives no opinion; but they are of opinion that the whole matter may be enquired into in this action; that the acts of Assembly are plain, and require no previous judgment to be recovered against the administrator, to render his securities liable to the suit of the person injured. Let the rule for a new trial be made absolute.

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Whitlocke v. Walton.

Whitlocke v. Walton and Freeman. } Case agreed from Gates.

The saving in the statute of limitations, as to persons "*beyond seas*," does not extend to persons resident in other States of the Union.

The Defendants gave a letter to Copeland and Freeman, directed and to be delivered to the Plaintiff, and therein requested the Plaintiff to furnish Copeland and Freeman with goods to the amount of two thousand dollars, and promised to be securities for the payment of that sum. The goods were accordingly furnished by the

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Plaintiff, and after more than three years had elapsed from the delivery of the goods, this action was brought, to which the Defendants pleaded, "that they had not assumed within three years," and rested their defence upon the statute of limitations. The Plaintiff, at the time he delivered the goods, and continually afterwards up to the time of bringing this suit, resided at Suffolk, in the State of Virginia. There was a verdict for the Defendants; and the Plaintiff having obtained a rule for a new trial, it is submitted to the Supreme Court to decide, "Whether the saving in the statute of limitations, 1715, ch. 27, sec. 9, as to persons beyond seas, extends to a person resident in the State of Virginia?"

Hall, Judge, delivered the opinion of the Court:

Although more than three years have elapsed since the Plaintiff's cause of action accrued, it is contended, that as he was a resident of the State of Virginia, his case is embraced by the ninth section of the act of 1715, ch. 27, which gives a further time to Plaintiffs "beyond seas," &c. to bring their actions, provided they do so, within a certain time after their return from beyond seas. The Plaintiff is certainly not within the words of the proviso, and it does not appear to the Court, that he falls within the true meaning and spirit of it. Great is the intercourse between the citizens of this State and the citizens of other States, particularly adjoining States; and if suits were permitted to be brought on that account against our own citizens, at any distance of time, by citizens of other States, the mischief would be great. Let the rule for a new trial be discharged.

Scott
v.
Drew and others. } Case agreed from Chowan.

Under the act of 1801, ch. 10, sec. 4, ten per cent. is to be calculated upon the *principal of the debt only*, from the rendering of the judgment in the County Court, to the rendering of the judgment in the Superior Court; and six per cent. thereafter until the debt be paid.

At November Term, 1804, of Bertie County Court, Scott obtained judgment against Drew in an action of debt, upon a bond conditioned in the penalty of £5685 17*s.* 2*d.* for the payment of £2842 18*s.* 6*d.* with interest from the first of August 1800. Drew appealed, and at March Term, 1807, of Chowan Superior Court, the Plaintiff obtained judgment; and on motion, judgment was rendered against his securities for the appeal. As the Defendant did not, in the Superior Court, diminish the amount of the judgment recovered against him in the County Court, a question arose, how the ten per cent. interest given by the act of 1801, ch. 10, was to be calculated? And it was submitted to the Supreme Court to decide, Whether the ten per cent. given by this act shall be calculated upon the principal only of the said debt, or upon the aggregate amount of principal and interest due at the time of the judgment in the County Court?

HALL, Judge, delivered the opinion of the Court:

The act of 1801, ch. 10, sec. 4, states, "that where a Defendant, in any action of debt, &c. shall appeal, &c. and shall not, on the trial of such appeal, diminish the sum recovered by the Plaintiff, &c. the party so appealing shall pay to the Plaintiff the sum of ten per cent. to be computed from the time of rendering judgment in the County Court, to the time of rendering up judgment in the Superior Court, and the lawful rate per cent. from

JULY, 1811. Shepherd v. Sawyer.

that time till the whole debt shall be paid," &c. The true construction of this act is, that ten per cent. shall be paid upon the principal of the debt, and not upon the principal and interest added together. The Legislature intended to substitute ten per cent. in the place of six per cent. the legal interest, from the time of rendering judgment in the County Court, to the rendition of the judgment in the Superior Court, and to charge the Defendant with the lawful rate per cent. from that time till he paid the debt.

Shepherd v. Sawyer. } Special verdict from Camden.

A. agrees with B, for 2½ per cent. premium paid down, to insure a negro slave reported to be lost in Pasquotank river. B. had no interest in the negro; yet his loss being proved, B. is entitled to recover his value.

Innocent wagers are recoverable. They are illegal, where,

1. They be prohibited by statute.
2. They tend to create an improper influence on the mind in the exercise of a public duty.
3. They are "*contra bonos mores*," or
4. They in any other manner tend to the prejudice of the public, or the injury of third persons.

The Jury found for the Plaintiff, and assessed his damages to £200, subject to the opinion of the Court upon the following case. The Plaintiff, Shepherd, started a boat loaded with brick, from Richmond, on Pasquotank river, down to Davis's bay, a distance of about seven or eight miles; the boat was rowed by a white man and several negroes, among whom was the fellow Jacob, hereafter mentioned. A few days after the boat was started, a report was circulated that the boat and all persons on board were lost. The Plaintiff and Defendant were together at Camden court-house, when this report

reached that place, and the Defendant offered to insure the negro fellow Jacob for the premium of two and a half per cent. which offer was accepted by the Plaintiff, and the premium was paid down. It afterwards appeared that Jacob and all the other hands on board of the boat were lost. The Jury found that the conduct of the Plaintiff was fair, open and candid, but that he had no interest whatever in the property insured.

HALL, Judge, delivered the opinion of the Court:

It is submitted to this Court to decide, whether, upon the facts found by the Jury in this case, the Plaintiff be entitled to recover? It is not contended that this case falls within the purview and meaning of any act of Assembly passed in this State, for the purpose of suppressing unlawful gaming; and there can be no doubt, but that the Common Law (which is the Law of this State) interposes no obstacle to a recovery. *Marshall*, on Insurance, 96, says, "Innocent wagers have long had the sanction of the Common Law;—(11 *Rep.* 876—1 *Lev.* 33—5 *Bur.* 2802)—they are only deemed illegal when they are prohibited by statute; when they tend to create an improper influence on the mind in the exercise of a public duty; when they are "*contra bonos mores*," or in any other manner tend to the prejudice of the public, or the injury of third persons"—(6 *Term* 499—1 *Term* 56—2 *Term* 610—*Cowper* 729.) And to the cases referred to by *Marshall*, may be added the case of *Good* v. *Elliott*, (3 *Term* 693.) These authorities are conclusive. Let judgment be entered for the Plaintiff.

JULY, 1811.

Den on demise of the heirs of Williams
v.
Askew.
} Appeal from Hertford.

A judgment against the executor or administrator, creates no lien on lands descended or devised: And lands *bona fide* alienedby the devisee, before *scire facias* sued out against him, are not liable for his testator's debts.

Lewis Brown being indebted to John Armstead by bond, binding himself and "*his heirs*," died about the year 1805, having previously published in writing his last will and testament, and therein devised the lands mentioned in the declaration of ejectment, to Anthony Brown. Administration on the estate of Lewis Brown was granted with the will annexed, and suit being brought against the administrator upon the aforesaid bond, the administrator pleaded that "he had fully administered," &c. which plea was found by the Jury to be true, and judgment having been obtained on the said bond in August, 1806, a writ of *scire facias* was issued against Anthony Brown, the devisee, to shew cause why the Plaintiff should not have judgment of execution against the lands devised to him by Lewis Brown. Judgment was rendered against Anthony Brown upon this *scire facias*, in August, 1807, upon which a writ of execution was issued, and the lands aforesaid devised to Anthony Brown, were seized by the Sheriff and sold to satisfy the said execution; at which sale the Defendant Askew became the purchaser, and the Sheriff executed to him a deed for the land on the 25th November, 1808. Defendant set up title under this deed.

On the 23d December, 1806, subsequent to the rendering of the judgment against the administrator, but previous to the suing out of the *scire facias* aforesaid, Anthony Brown, the devisee, conveyed the lands, for a valuable consideration, to Richard Williams, under whom

the lessors of the Plaintiff claim title. There was a verdict for the Plaintiff, and a rule for a new trial being granted, and on argument discharged by the Court, the Defendant appealed to this Court.

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WILLIAMS v. ASKEW.

HALL, Judge, delivered the opinion of the Court:

The only question in this case is, Whether the devisee, having sold the lands in question to a *bona fide* purchaser for a valuable consideration, after process had been taken out against the administrator, with the will annexed, but before a *scire facias* had issued against him, the devisee, the lands so sold should be subject to the testator's debts. If any doubts existed on this subject before the act of 1789, ch. 39, that act has removed them. The third section of that act declares, that "wherever an heir or devisee shall be liable to pay the debt of his or her ancestor or testator, &c. and shall sell, &c. before action brought, or process sued out against him or her, that such heir or devisee shall be answerable for such debt to the value of the land so sold, &c." It concludes by declaring, "that the lands, &c. *bona fide* aliened before the action brought, shall not be liable to such execution." This act embraces, not only heirs that were bound at common law, to pay off the debt of their ancestors in consequence of lands descending upon them, and in consequence of being named in the obligations of their ancestors, but also heirs and devisees who are made liable by the statute law, to the simple contract debts of their ancestors. As to the first, there can be no difficulty, because an action brought or process sued out to recover such debts, must be directly, and in the first place, brought against them: as to the latter, it is contended by some, that the action and process spoken of by the act, mean the commencement of the suit against the executor or administrator. As has been already observed, whatever doubts may have existed upon this subject, in consequence of the act of 1784, they have

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been removed by the act of 1789, which speaks of "actions brought, or process sued out, against him or her," that is, the heir or devisee, as the case may be. The concluding part of the section exempts "lands sold *bona fide* before action brought," from execution. When the act is speaking of the heir and devisee, and of actions, &c. brought against them, it is surely a very forced construction to say, that it means actions brought against the executors or administrators, when they are not mentioned in the act as connected with this subject. Such a construction has no reason to support it, and were it to prevail, *bona fide* sales, made by heirs or devisees who were ignorant even of any process being sued out against the executor or administrator, would be rendered invalid: the process sued out against the executor or administrator, and the judgment rendered thereon, create no lien upon the real estate descended or devised. In the present case, Williams, the purchaser from the devisee, acquired the lands honestly; his title is therefore good. Judgment must be entered for the Plaintiff, and the rule for a new trial be discharged.

Jordan
v.
Black and Hornibleau.

Appeal from the Court of Equity for Perquimons.

A. having recovered a judgment against B, assigned it to C; B. obtained an injunction, and C. in his answer, insisted that the judgment had been assigned to him for a valuable consideration, and that he had no notice of the equity of B. Held,

That the judgment was a *chose in action*, and that a purchaser of a *chose in action* for a valuable consideration, without notice of another's equity, stands in the same situation with the assignor of the chose; and is not protected by being a purchaser for a valuable consideration without notice, against the claims of him who has equity.

William Black, one of the Defendants, recovered a judgment at law against the complainant, against which

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judgment the complainant obtained an injunction, upon the ground that the debt was due to the Defendant and one David Black, trading in partnership as merchants under the name and firm of William Black, & Co.; which company had failed, and both parties were insolvent, having assigned all their debts and effects to their creditors, who had thereupon appointed David Black their agent: that after this appointment, Complainant had accounted with David Black, as agent aforesaid, and taken a full discharge. To these allegations, the Defendant, William Black, answered, that the copartnership had been dissolved some months before the Complainant contracted the debt on which the said Defendant had recovered judgment: that the debt was contracted with the Defendant alone, the Complainant having full notice of the dissolution of the said copartnership. The other Defendant, Elizabeth Hornibleau, charges that her Co-Defendant, William Black, by deed duly executed, bearing date the first day of June, 1804, assigned the same debt to her in satisfaction *pro tanto*, of a debt justly due to her by the said William Black; and denied notice of Complainant's equity, and also denied all the allegations of the Complainant's bill. Upon this, an issue was made up to try whether the debt was a copartnership debt or the individual debt of William Black: and to prove the debt to be a copartnership debt, the only testimony offered, was the deposition of the other partner, David Black, upon whose testimony the issue was found for the Complainant, and a decree was made perpetuating the injunction; from which the Defendants appealed to this Court, upon the following points: 1st. Was David Black a competent witness? 2d. If he be a competent witness, Elizabeth Hornibleau, being a fair purchaser for a valuable consideration without notice of Complainant's equity, will a Court of Equity interpose to defeat her of the recovery at Law?

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HALL, Judge, delivered the opinion of the Court:

The Law relating to the competency of witnesses is too well settled at this day to leave any doubt upon the first point submitted in this case. The general rule is laid down in the case of *Bent* v. *Baker*, "that the witness is competent, if the verdict cannot be given in evidence either for or against him in any other suit," &c. The finding of the Jury upon the issue submitted to them in the present case, cannot be used by the witness as evidence in any other suit. There may be exceptions to the general rule, but this is not one. The deposition of David Black was therefore properly received.

As to the second point, it is to be observed, that Mrs. Hornibleau has taken an assignment of a *chose in action*, a *judgment*, a thing in its nature not assignable at Law. She therefore cannot stand in a better situation than her assignor. Upon an examination of the authorities upon this subject, it will be found, that the ground taken by Mrs. Hornibleau is tenable by those persons only, who, having the "*legal title*" in them, plead that they are purchasers for a valuable consideration and without notice. By this plea, they shew that they have as much equity on their side as their opponents, and that being the case, a Court of Equity will not interfere, and divest them of their legal title. All that Mrs. Hornibleau shews, is, that she purchased Black's right to a chose in action; She then has *no legal*, but only an *equitable* right. But Jordan shews, that Black obtained the judgment against him unconscientiously, and this Court will say, in such case, that he shall not have the benefit of it, nor shall Mrs. Hornibleau, as she can stand in a situation no better than her assignor. Let the injunction therefore be perpetuated.

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Shober
v.
Robinson, Bevill and wife. } Appeal from Stokes.

A covenant "*to warrant and defend the negro Peter to be a slave,*" is a covenant only against a superior title. It does not bind the warrantor, on receiving notice from the warrantee that a suit is brought to ascertain whether Peter be free, to come forward and make defence and put a stop to the eviction. He is bound to make defence only when he is sued upon his covenant; and then if he can shew that Peter was a slave at the time of the sale, he shall be discharged. And

The record of the proceedings in a suit brought by Peter against the purchaser, in which the Jury found that Peter was a freeman, and not a slave, is not conclusive against the covenantor, although he had notice of the said suit.

This was an action of covenant, founded upon a bill of sale for a negro fellow named Peter, sold to the Plaintiff by Andrew Robinson and Mary Hamilton, since intermarried with Thomas Bevill, at the price of £240. The bill of sale contained the following covenant, to wit: "And we do hereby covenant for ourselves, our heirs, executors and administrators, to and with the said Gotleib Shober, his executors, administrators or assigns, to warrant and defend the said *negro to be a slave.*" And a breach of this covenant was assigned in the declaration. The Defendants pleaded, "that they had not broken their covenant," &c. and the Plaintiff having replied, and issue being joined, the following facts appeared in evidence. The Plaintiff took Peter into his possession, immediately after the execution of the aforesaid bill of sale, and in April 1809, Peter, claiming to be a free man, instituted an action of assault and battery and false imprisonment, against the Plaintiff, in the Superior Court of Law for Stokes county; who thereupon appeared by counsel, and pleaded to the said suit a plea in abatement thereof, to wit, "that the negro fellow Peter, suing by the name of Peter Archer, was a slave, and not a free-

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Shober v. Robinson.

man," to which plea there was a replication, and issue being joined between the parties, it was tried at October Term, 1809, when the Jury found that the negro fellow Peter was a freeman, and not a slave. Shober gave notice to Hamilton and Robinson, of the claim which Peter set up to freedom, and of the suit which he had brought to enforce his right. They appeared and employed counsel to defend the suit, and Shober assisted their counsel in making defence; one of them, to wit, Robinson, was present at the trial, and challenged Jurors.

After the verdict and judgment in this case, Shober brought the present suit against his vendors, Robinson and Hamilton, and set forth in his declaration, a breach of the covenant before mentioned. The cause came on to be tried, when Shober gave in evidence to the Jury, the verdict, judgment and proceedings in the suit of Peter against him, as before set forth, and relied upon them as *conclusive* against the Defendants. The Defendants, in support of their plea, "that they had not broken their covenant," &c. offered evidence to prove that notwithstanding the finding of the Jury in the other case, Peter was a slave, and not a freeman. The Plaintiff objected to the admission of this evidence, upon the ground that the Defendants were concluded by the former verdict. The Court overruled the objection, and the evidence was received; upon which the Jury found that the negro fellow Peter, on the day on which Defendants sold him to the Plaintiff, was a slave, and not a freeman; but whether, notwithstanding this fact, the Plaintiff was entitled to recover, they prayed the advice of the Court. It appeared in evidence, that it was known to Shober, as well as to Robinson and Hamilton, before the trial of the suit of Peter v. Shober, that John Hamilton, then living within the jurisdiction of the Court, could depose to facts, which would shew, that Peter was a slave, and not a freeman, and that neither of them had the said John subpœnaed as a witness, nor requested his attendance as

such. Hamilton was the only witness examined by Defendants to prove that Peter was a slave.

Upon this case, the Court gave judgment for the Defendants; from which judgment the Plaintiff appealed to this Court; and at this term the case was argued by *Williams* and *Browne* for the Plaintiff, and by *Norwood* for the Defendants.

June, 1811.

Shober v. Robinson.

Locke, Judge, delivered the opinion of the Court:

This case presents two questions for the consideration of the Court; 1st. What is the true construction or operation of the warranty contained in the covenant set forth in the Plaintiff's declaration? Does it bind the Defendants, on receiving notice from the Plaintiff of a suit being brought to ascertain the freedom of the negro Peter, to come forward and make defence in the place and stead of the present Plaintiff, and put a stop to the eviction; or are they bound to make defence only when suit is brought against them on this covenant? And if the latter, then 2dly. Whether the verdict rendered between the negro Peter and the present Plaintiff is, or is not, conclusive against these Defendants?

To shew that the warranty binds the warrantor to make defence and put a stop to the eviction, *Coke Litt.* 365, sec. 1, *a.* has been cited; and it is true, it is there said, "That in the Civil Law, warranty is defined to be the obligation of the seller, to put a stop to the eviction or other troubles, which the buyer suffers in the property purchased." It is not necessary to enquire what were the nature and extent of the obligation, which by the Civil Law, a warranty imposed upon the seller of personal property, nor what were the forms of proceeding where the buyer was sued and gave notice to the seller to stop the eviction; for the definition of *warranty* here copied by the author from the Civil Law, corresponds with that kind of warranty of which the author was treating, to wit, warranty of freeholds and inheritances, and with the form of proceedings against the warrantor

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upon the writ of warrantia chartæ, in which the warrantor is vouched and compelled to come forward and make himself a party and defend his title. The action of warrantia chartæ has become obsolete in England, and was never in use in this State. The action of covenant has been substituted in its place; in which it is impossible for any other parties to be made, than those against whom the Plaintiff may think proper to bring his action. To give, then, to warranties respecting chattels, the construction and operation contended for by the Plaintiff, would be to compel a vendor to make defence to an action in which he is no party, and in which, by the rules of Law, he could not use nor sue out any process whatever. It appears, therefore, to the Court, that the fair and just construction of the warranty in question is this, that "the Defendants covenanted, that when legally called upon by an action grounded on the warranty, at the instance of the Plaintiff, they would shew that the negro Peter was a slave, or if they could not, that they would repair the Plaintiff's loss by an equivalent in damages; in short, that they only meant to warrant against a superior title, and not against every suit or molestation to which the purchaser might be exposed, and to which they were no parties. Perhaps, if it could be shewn that a purchaser was really ignorant of the witnesses necessary to support his title, and they were within the knowledge of the seller, who, upon a proper application, refused to discover them until after an eviction, a Court of Law might view such conduct as a deceit and fraud, for which the purchaser would be entitled to recover. But this case furnishes no ground for such an action, because the evidence to prove that Peter was a slave was known to the Plaintiff: however, the Court do not mean to give any opinion upon the right to recover in such a case as has been stated, because that point does not arise in the case submitted.

If, then, such is the true construction to be given to the warranty contained in the covenant declared upon, what

is the effect of the verdict and judgment recovered by Peter against the present Plaintiff, as against the Defendants? On this point, the Court is clearly of opinion, that the verdict being between different parties, ought to have no other effect than merely to shew that the Plaintiff was evicted, and put the Defendants to the necessity of shewing that the negro Peter was a slave; but that it is by no means conclusive—(*Pear* v. *Templeton*, 2 *Hayw. Rep.* 380—*Peake's Evidence*, 26.) Judgment for the Defendants.

Lester v. Goode. } Appeal from Stokes.

New trial. Several of the Jurors swore, that they, in forming their verdict, had misconceived a material fact sworn to by one of the witnesses; and the witness also swore that the fact was otherwise than as understood by the Jurors. This is no good ground for a new trial, particularly where the affidavits be in the hand writing of the party asking for a new trial.

During the trial, a man declares to a bye-stander, that he knows more of the subject matter in controversy, than all the witnesses examined; and then leaves the Court before a subpœna can be served on him. This is no good ground for a new trial.

This was an action of trover brought to recover the value of a horse claimed by the Plaintiff. Upon the trial there was evidence adduced on both sides, each party setting up a claim to the horse. The evidence was commented upon at length, by the counsel on each side, and stated at large by the Court in the charge to the Jury. There was a verdict for the Defendant. A rule for a new trial was granted; and, in support of the rule, the Plaintiff's counsel read to the Court sundry affidavits: 1st. Of several of the Jurors who tried the cause, stating that they had not correctly understood the evidence of one of the witnesses, introduced in behalf of the Plaintiff: that from

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a misconception of a material fact deposed to by the witness, they were induced to find a verdict for the Defendant. 2d. Of the witness referred to by the Jurors in their affidavits, explaining at large the material fact aforesaid, in a way different from that in which the Jurors swore they had understood it upon the trial. 3d. Of a Mr. Dobson, (a bye-stander) who swore, that during the trial, a man in his hearing observed, that the evidence appeared to be strong against the Defendant, and that he knew more on the subject in dispute, than all the witnesses present. 4th. Of the Plaintiff, who swore that as soon as he was informed of this declaration made by the man, he used all possible diligence to get him subpœnaed, but that the man left Court before a subpœna could be served on him. These affidavits were all in the hand-writing of the Plaintiff. The Court discharged the rule for a new trial, and the Plaintiff appealed to this Court.

Locke, Judge, delivered the opinion of the Court:

It appears strange that the facts stated by the Plaintiff's witness should have been misconceived by the Jury, as the evidence was commented upon at length by the counsel on each side, and stated at large by the Court in the charge to the Jury, with the necessary remarks, shewing its bearing on the points in dispute. Yet some of the Jurors signed an affidavit, in the hand writing of the Plaintiff, setting forth that they were deceived. Admitting this to be the case, surely little reliance ought to be placed on the affidavits of Jurors procured at the instance of a party. Every Plaintiff or Defendant against whom a verdict is rendered, is apt to be displeased; and in the street, or some public house, where Jurors too commonly assemble, they are attacked by the party cast; and by address, entreaty, and sometimes rewards, are prevailed upon to sign something in favor of the party, although they have, under the solemn obligations of an oath, rendered their verdict against him.

Such tampering with Jurors ought to be discountenanced, and when their affidavits are offered upon the subject of their verdict, they ought to be received with many grains of allowance, and their weight balanced by the degree of influence which the party obtaining them is calculated to produce.

The circumstances disclosed by Dobson and the Plaintiff, in their affidavits, do not furnish any ground for a new trial. Were new trials to be granted for reasons like those contained in these affidavits, there would be no end to suits: days might be spent in investigating their merits, and verdicts might be rendered, but all to no purpose. They must all be revised, if the party cast has been artful enough to procure some person to be present at the trial, who shall declare to a bye-stander, during its progress, that he knows a great deal upon the subject of dispute, and then leave the Court, so that a subpœna, which the party in due time takes out, cannot be served on him. If, indeed, the affidavit of this witness had been taken, and it had disclosed important evidence for the Plaintiff, the case would have been very different. But it does not appear whether his evidence would have been material or not. To these reasons for discharging the rule for a new trial, may be added another. It appears that each party claimed title to the horse, and evidence was introduced on both sides. In cases where there is a contrariety of evidence, the Court will not grant a new trial, unless the evidence on one side greatly preponderates. Let the rule for a new trial be discharged.

JULY, 1811.

The Justices of Caswell County Court
v.
Buchanan.
} From Caswell.

Guardian bond. A guardian bond made payable to "the Justices of Caswell County Court," &c. was held to be void at Common Law; as *the Justices of the County Court* are not a corporation.

The act of 1762, ch. 5, directs guardian bonds to be made payable "to the Justice or Justices present in Court, and granting such guardianship, the survivors or survivor of them, their executors or administrators, in trust," &c.

This was an action of covenant brought on a guardian bond in Hillsborough Superior Court. The Bond was made payable "to the Justices of the County Court of Caswell, and their successors." Two objections were made to the Plaintiff's recovery; 1st, that the bond was not taken pursuant to the directions of the act of 1762, ch. 5, that act having directed guardian bonds to be made payable to the "justice or justices present in Court and granting such guardianship, the survivors or survivor of them, their executors or administrators, in trust," &c.—that the bond was therefore void as a statute bond. 2dly, that the bond was void at Common Law, for the want of proper contracting parties, "the justices of Caswell County Court" not being a corporate body, or entitled to sue or contract in a corporate name.

HALL, Judge, delivered the opinion of the Court:

The act of 1762, ch. 5, gives to the County Court very great powers over the interests of orphans, and the conduct of guardians; and does not, like the statute of 23d Henry 6th, ch. 10, declare all other bonds to be void, that are not taken agreeable to its provisions. This action might, therefore, probably be sustained, were it not for the other objection which the case presents. Every Plaintiff must sue either in his natural or corporate capacity; it cannot be pretended here that the

Plaintiffs sue in either. As to the first, it is sufficient to observe, that their individual names are not inserted in the writ or declaration; as to the latter, although they sue as justices, &c. yet they have never been created a corporation, by that name to sue or be sued, grant or receive, by its corporate name, and do all other acts as natural persons may.—(1 *Blac. Com.* 476.) Judgment for the Defendant.

June, 1811.

Keddie v. Moore.

Keddie
v.
Moore. } From New-Hanover.

The acts of Assembly increasing the jurisdiction of a justice of the peace to £30, are not inconsistent or incompatible with the Constitution of the State.

This was an action of debt, commenced by a warrant issued by a justice of the peace, which warrant commanded the ministerial officer to whom it was directed, to arrest the body of the Defendant, and have him before some justice of the peace for the county of New-Hanover, to answer the Plaintiff of a plea that he render to him £18, which he owed and detained, &c. The justice before whom the warrant was returned for trial, gave judgment for the Plaintiff, from which judgment the Defendant appealed to the County Court; and upon there turn of the appeal, pleaded in abatement of the warrant, "that the warrant was issued for a sum above twenty dollars; whereas, by the Constitution of the United States and the Law of the land, a justice of the peace has no jurisdiction in a sum over twenty dollars, and cannot issue a warrant or render any judgment for a sum greater than twenty dollars." The Plaintiff demurred to this plea, and the Defendant having joined in demurrer, the case was, by consent, removed to the Superior Court, and the

June, 1811.

Reddie v. Moore.

presiding Judge ordered the case to be sent to this Court, upon the question, "Whether a justice of the peace, by the Law of the land, has jurisdiction over a sum greater than twenty dollars?"

At this term, *Jocelyn* argued the cause for the Defendant; no counsel appeared for the Plaintiff.

Jocelyn.—The jurisdiction of a justice of the peace has been regularly increased from time to time since the year 1774, up to the year 1802. From five it has increased to thirty pounds. The increase has been gradual, and has therefore not alarmed us; but if there be no limitation to their jurisdiction, it may eventually swallow up the jurisdiction of our Courts of Justice. Already have the Legislature declared, that a justice of the peace may value *specific articles*, and give judgment for the value: upon the same principle, his jurisdiction may be extended to cases of trover, libel, trespass, &c. until the right of trial by Jury shall be frittered away entirely. This increase of jurisdiction is incopsistent with the spirit of our Bill of Rights, and the framers of our Constitution certainly intended that some restraint should be imposed upon the power of the Legislature over this subject. The 14th section of the Bill of Rights declares, "that in all controversies at Law respecting property, the ancient mode of trial by Jury is one of the best securities of the rights of the people, and ought to remain sacred and inviolable." How then did the ancient mode of trial by Jury stand? It extended to all controversies respecting property, where the sum in demand exceeded forty shillings sterling. The 12th section of the same instrument declares, "that no freeman ought to be taken, imprisoned, or dissesed of his freehold, liberties or privileges, or outlawed or exiled, or in any manner destroyed or deprived of his life, liberty or property, but by the Law of the land." Upon the same principle that the jurisdiction of a justice of the peace has been extended to all

debts, &c. not exceeding thirty pounds, and to assessing the value of specific articles, may it be extended over all personal injuries, and to injuries affecting a man's freehold. It is contended that the trial by Jury is not taken away by this increase of jurisdiction; that the party dissatisfied with the judgment of the justice may appeal to Court, where he may have his cause tried by a Jury. It is true the right of appeal is given by the Legislature, but this right may be so clogged with difficulties that law can enforce it, and as the Law now stands, it often deprives the poor, who cannot give security for an appeal, of the right of trial by Jury. But if the Bill of Rights is to control the Legislature upon this subject, no man can be deprived of his property but "*by the Law of the land.*" How does "*the Law of the land,*" here spoken of, declare that "*controversies respecting property* shall be determined?" Not by a justice of the peace, but by the "*ancient mode of trial by Jury,*" that mode of trial which this solemn instrument declares, shall remain "*sacred and inviolable.*" The Bill of Rights is the paramount Law of the land, and any act of the Legislature at variance with its provisions, is null and void. It is time to meet this question with firmness, and to check the growth of that power which has already become alarming. From the increase of justices and of their jurisdiction, we are threatened with an aristocracy of the most odious kind, and nothing seems likely to prevent its establishment, but the interposition of the Judiciary; that tribunal which spreads the shield of the Constitution over the citizen, and protects him from the unlawful attacks of the Legislative power.

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Locke, Judge, delivered the opinion of the Court:

It is intended, by the question arising upon this demurrer, to ascertain whether the act of Assembly, increasing the jurisdiction of a justice of the peace to the sum of thirty pounds, be inconsistent with the provisions

June, 1811.

Kaddie v. Moore.

of the Constitution, or not; and to shew that it is, the 14th section of the Bill of Rights is relied upon. This section declares, "that in all controversies at Law respecting property, the ancient mode of trial by Jury is one of the best securities of the rights of the people, and ought to remain sacred and inviolable." It is alleged, that at the time this Declaration of Rights was made, a justice of the peace had jurisdiction of sums only to the amount of forty shillings sterling, and that all the acts passed by the Legislature since that period, increasing the jurisdiction of a justice, are inconsistent and incompatible with this clause in the Declaration of Rights.

It must be admitted, that if, upon a fair examination of these several acts, they should be found incompatible with this or any other provision of the Constitution, it would be the duty of this Court at once to declare such acts void, and pronounce judgment for the Defendant. Otherwise to decide for the Plaintiff.

When the Convention declared that the ancient mode of trial by Jury should be preserved, no restriction was thereby laid on the Legislature as to erecting or organizing judicial tribunals, in such manner as might be most conducive to the public convenience and interest, on a change of circumstances affected by a variety of causes. It is true, that the Legislature cannot impose any provisions substantially restrictive of the trial by Jury: they may give existence to new Forums; they may modify the powers and jurisdiction of former Courts, in such instances as are not interdicted by the Constitution, from which their legitimate power is derived; but still the sacred right of every citizen, of having a trial by Jury, must be preserved. These remarks lead us to enquire, whether the several acts passed by the Legislature, increasing a justice's jurisdiction, have taken from the citizen this right, or not?

At the time the Constitution was formed, it must have been well known to the framers of that instrument, that

a justice of the peace had jurisdiction over sums of forty shillings sterling and under; and that too without the intervention of a Jury. Did they mean, by the 14th section of the Declaration of Rights, entirely to destroy this jurisdiction, and have the benefit of the trial by Jury, in the first instance, in every possible case? Or did they intend, that when property came in question, (which was always tried in a Court of Justice by a Jury) this ancient and beneficial mode of trial should still be preserved? It appears to the Court that the latter was the object for which they intended to make provision. The Legislature has also given to either party the right of appealing to a Court, where he will have the benefit of a trial by Jury. It cannot, therefore, be said, that the right of such trial is taken away. So long as the trial by Jury is preserved through an appeal, the preliminary mode of obtaining it may be varied at the will and pleasure of the Legislature. The party wishing to appeal may be subjected to some inconvenience in getting security, but this inconvenience does not in this, nor in any other case where security is required, amount to a denial of right. In conformity with the opinion here given, is the case of *Emerick* v. *Harris*, (1 *Binney's Rep.* 416,) decided in the Supreme Court of Pennsylvania, where the provision in the Constitution is the same, and where the jurisdiction of a justice of the peace has been gradually increased. The Court, therefore, cannot view this as a case which will warrant the Judiciary to exercise an act of such paramount and delicate authority as to interfere with the act of the Legislature.

June, 1811.

Keddie v. Moore.

Let the demurrer be sustained, and plea in abatement be overruled.

July, 1811.

Richmond v. Boman. } From Caswell.

Jurisdiction of a justice of the peace. The act of 1802, ch. 6, giving jurisdiction of penalties not exceeding £30, to a justice of the peace, is not inconsistent with the spirit of the Constitution: Therefore,

A justice of the peace has jurisdiction of the penalty given by the act of 1741, ch. 8, for mismarking an unmarked hog.

The act of 1741, ch. 8, inflicts a penalty of ten pounds proclamation money, for mismarking an unmarked hog, &c. to be recovered in any Court of Record, by any person who will sue for the same. By the act of 1802, ch. 6th, jurisdiction is given to a justice of the peace over all penalties that do not exceed in amount thirty pounds. Under this act, Richmond brought a warrant before a justice of the peace for Caswell county, to recover of Defendant the penalty of ten pounds, given by the act of 1741, for mismarking an unmarked hog not properly his own, but the property of the Plaintiff. He obtained judgment before the justice, and the Defendant appealed to the County Court, where he demurred specially to the warrant, and for cause set forth, that a justice of the peace had not jurisdiction of the penalty claimed by the Plaintiff; there was a joinder in demurrer, and the case was removed by consent to the Superior Court, and thence to this Court.

Locke, Judge, delivered the opinion of the Court:

The case of Keddie v. Moore, decided at this term, has settled the question upon this demurrer. The Court are of opinion, that the act of 1802, ch. 6, is not incompatible with the spirit of the Constitution: that act has given to a justice of the peace jurisdiction of all penalties, &c. in amount not exceeding thirty pounds. Let the demurrer be overruled.

JULY, 1811.

William Williams
v.
Josiah Collins. } From Bertie.

Case of guaranty. A. applied to B. to purchase a vessel and cargo, and B, entertaining doubts of his solvency, refused to credit him. A. then got from C. a letter directed to B, in which C. says, "A. informs me that he is about bargaining with you for the purchase of a new vessel and cargo: In case you and he should agree, I will guarantee any contract he may enter into with you for the same, or any part thereof." On the credit of this letter, B. sold to A. a vessel and cargo, and took his bonds for the purchase money; one payable 1st January, 1805, another on the 15th June, 1805, and the third on the 15th June, 1806. On the 17th August, 1807, suit was brought against A. on the bonds, judgment recovered in March, 1808, and execution against A's property was returned to June term following, indorsed by the Sheriff, "nothing found." Whereupon B. brought suit against C. on his letter of guaranty. It appeared on the trial, that at the time the several bonds respectively fell due, A. had property sufficient to pay their amount; which property he mortgaged in October after the last bond fell due and in January following, to secure divers debts which he owed. There was no evidence that B. had applied to A. for payment, until suit was brought on the bonds, except an inference to be drawn from the indorsement of certain payments on the bonds, after they became due; nor was there any evidence that C. had notice of A's failure to pay, and that B. looked to him for payment, until suit was brought against him. Held, that C. was discharged from liability on his letter of guaranty, by the want of due diligence in B. to get payment from A, and by his failure to give notice, within a reasonable time, to C, of A's delinquency.

Henry Fleury applied to the Plaintiff to purchase, on a credit, a vessel and cargo; but the Plaintiff, entertaining some doubts of his sufficiency, refused to credit him. Fleury then procured from the Defendant a letter directed to the Plaintiff, in the following words:

"*Gen. Wm. Williams,*

SIR—The bearer hereof, Mr. Henry Fleury, informs me that he is about bargaining with you for the purchase of a new vessel and a cargo for her, also for a quantity of Indian corn. In case you and he

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v.
Collins.

should agree, I will guarantee any contract he may enter into with you for the same or any part thereof, and am

Your ob't serv't,
JOSIAH COLLINS."

On the credit of this letter, the Plaintiff sold to Fleury a vessel and cargo for $2072 25, for which he gave three bonds, each bearing date the 11th April, 1804; one for $902 25, payable 1st of January, 1805, with interest from the 15th June, 1804; another for $585, payable 15th June, 1805; and the third for $585, payable 15th June, 1806. There was a credit of $675 71, indorsed on the first bond, 15th June, 1806, and a credit of $450 indorsed on the last bond, 12th January, 1808. On the 17th November, 1806, Williams assigned the bonds to Thomas E. Sumner, who, on the 17th August, 1807, brought suit on them in Chowan County Court, and obtained judgment at March term, 1808, for £604 7s. 10d. He sued out execution, which was returned to the next term, "nothing found;" and Williams having, in his assignment of the bonds, "obliged himself to guarantee the ultimate payment thereof to Sumner," did, upon the application of Sumner, pay the amount due upon the bonds, and on the 16th September, 1808, brought suit against Collins on his aforesaid letter of guaranty. The Defendant pleaded the "general issue, set-off, stat. lim."

On the part of the Defendant it was proved, that on the 29th October, 1806, Fleury mortgaged to him seven lots and one half lot of ground, with their improvements, lying in the town of Edenton, to secure the sum of £1256, 18s. 8d. due by note; and on the same day Josiah Collins, junior, took from Fleury a mortgage for the same property on the back of the foregoing, to secure the payment of $954 22, due by note: and on the 15th January, 1807, Fleury mortgaged the same property, with a store-house and shop, eleven negroes and a considerable quantity of furniture, to certain merchants in New-York, to secure the payment of six thousand dollars

due by him to them. The Defendant also proved, that Fleury possessed the property mentioned in the foregoing mortgages for many years before, and that the lots were among the most valuable in the town of Edenton: that on the 6th August, 1806, one Francis Vallette, of Edenton, having died, bequeathed to Fleury property of the value of $4000, which came to his hands.

It appeared in evidence, that Collins, the Defendant, was a subscribing witness to the mortgage executed by Fleury, on 15th January, 1807, to certain merchants in New-York, and that the property included in this mortgage, but not in the preceding mortgages, was sold for twelve or thirteen hundred pounds. It did not appear that Fleury had any property out of which the debt to the Plaintiff could have been satisfied, except the property before enumerated.

The Jury rendered the following verdict, to wit, "The Jury find, from the evidence adduced, that the Defendant must have been better acquainted with the circumstances of Henry Fleury, than the Plaintiff, and that the Plaintiff could not at any period have obtained his money from Henry Fleury, even though he had commenced suit as soon as his cause of action accrued, and that the Defendant did assume, that he did assume within three years, that there is no set-off, and assess the Plaintiff's damages to £716 1s. 8d." A rule was obtained to shew cause why a new trial should not be granted, on the grounds, 1st. That the verdict was contrary to Law. 2dly. That it was contrary to evidence, at least so far as it found that the Plaintiff could not, at any time after the debt became due, have obtained payment from Fleury. The rule for a new trial was sent to this Court, where it was argued by *Browne*, for the Defendant, and by *Jones* and *Cherry* for the Plaintiff.

Browne, in support of the rule, said, this contract must be considered either as a primary or a secondary

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Williams v. Collins.

contract: if as a primary contract, then the Plaintiff's cause of action accrued at the respective times when Fleury's bonds fell due, and his right of recovery is barred by the statute of limitations. But he did not suppose this contract ought to be so considered: it is a contract of a secondary kind. Defendant agreed to guaranty the debt to the Plaintiff, and is placed by the Law in the same situation with indorsers of bills of exchange or promissory notes. He agreed to guaranty a primary contract, and the Law, whilst it deems this guaranty binding upon him, does so *sub modo* only: it at the same time imposes certain obligations upon him who claims the benefit of this guaranty; it declares to him, that he shall use due diligence to reap the benefit of the primary contract, and to collect the debt from him who really owes it. For the person making this secondary contract only agrees to pay the debt, if the principal does not; and in all cases is discharged from liability, if due diligence be not used to enforce the contract against the principal, and get the money from him. In this case, Williams had discharged Collins from his guaranty by the indulgence which he extended to Fleury. Had he sued Fleury when his bonds became due, the money could have been collected: but he neither sued nor demanded payment, nor gave notice to Collins of Fleury's neglect to make payment. This is a commercial transaction, and is to be governed by the general law respecting commercial contracts, where one man guarantees the payment of another's debt. Williams having failed to use the diligence which that law required in demanding payment, and giving notice of Fleury's neglect or refusal to make such payment, has discharged Collins; who, not having received any such notice, remained ignorant of Fleury's failure to pay at the time when he took the mortgage to secure his own debt. This is the legal presumption; for every man shall be presumed to have done his duty until the contrary appears; Fleury shall

be presumed to have paid his bonds at the times they respectively fell due, or that he would have paid them if Williams or his assignee had applied for payment. It was not the duty of Collins to enquire whether he had made such payment; it was the duty of Williams to give him notice if Fleury failed to pay; and to compel him to make good the debt to Williams, would be, not to conform to the true spirit of the contract on his part, but to subject him to a hardship against which he has no relief. If he had been regularly called upon for payment as Fleury made default, he could have advanced the money to Williams and indemnified himself out of Fleury's property. Williams gave indulgence until Fleury became insolvent, and Collins has not been called upon for payment, until he has lost all opportunity of indemnifying himself.

Collins was liable on his letter of guaranty, only in case of Fleury's failing to pay; and it may be laid down as a general principle, that where one man agrees to indemnify another against any loss, which he may sustain from any transaction, the person thus indemnified must use ordinary diligence to prevent any loss—(*Doug.* 514—3 *Term Rep.* 524—8 *East* 242.) Here the first demand on Fleury was by suit, one year and two months after the last bond became due; and the first notice of Fleury's delinquency that was given to Collins, was two years and three months after the last bond became due. This was not using due diligence to get the money from Fleury, and prevent a loss to Collins. And

BY THE COURT.—For the reasons urged by the Defendant's counsel, let the rule for a new trial be made absolute.

JULY, 1811.

Den on demise of Hardy
v.
Jones.
} From Washington.

In ejectment, the lessor of the Plaintiff claimed title under a grant describing the lands *as confiscated lands*, the property of A. B. It is incumbent on him to shew that the lands had been confiscated, to authorise the issuing of the grant. For the grant shews the title was once *out* of the State, and accounts for its being again *in* the State, by averring the fact of confiscation. This fact must be proved, otherwise it does not appear that the State had any authority to make the grant.

The lessor of the Plaintiff claimed title under a grant from the State, by which the lands in question were granted to him as confiscated lands, the property of Governor White; and it was objected by the Defendant, that it was incumbent on him to prove that the land had been confiscated, to authorise the issuing of the grant. The presiding Judge overruled the objection, and there was a verdict for the Plaintiff. A rule for a new trial being obtained, the same was sent to this Court.

BY THE COURT.—It appears from the Plaintiff's own shewing, that the title to the lands was once *out* of the State and *in* Governor White. The State cannot resume this title at her pleasure, and pass it by grant to the lessor of the Plaintiff; nor has she pretended to do such an act; but in the grant she declares that the lands of Governor White had been confiscated, and the title to them vested in her by the confiscation. If this be true, the State had a right to grant the lands to the lessor of the Plaintiff; but if not true, the State had no such right. The fact of confiscation is therefore necessary to be proved, before any validity can attach to this grant. The rule for a new trial must be made absolute.

JULY, 1811.

James Reid
v.
Josiah Powell. } From Halifax.

Bridges v. Smith.

In detinue for a slave, A. was offered by the Defendant as a witness, and being sworn on his *voir dire*, said, he as constable had sold the negro, under an execution at the instance of B, and at the sale also acted as B's agent, and bid off the negro, and by the direction of B. executed a bill of sale, as constable, to C. the Defendant. A. is a competent witness to prove these facts to the Jury.

This was an action of detinue for a negro slave. On the trial, one Gregory being called as a witness for the Defendant, was sworn on his *voir dire*, and said that he as constable had sold the negro in question, under an execution at the instance of one Bell; that at the sale he also acted as agent for Bell, and bid off the negro for Bell's use, and afterwards, by the direction of Bell, he, as constable, made a bill of sale for the negro to the Defendant, who was not a bidder. The presiding Judge thought Gregory was not a competent witness; he was set aside, and a verdict was rendered for the Plaintiff. A rule for a new trial was obtained and sent to this Court. And,

BY THE COURT.—Let the rule be made absolute.

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William Bridges, jun.
v.
Lawrence Smith. } From Northampton.

The statute of 31st Elizabeth, ch. 5, limiting the time for bringing *qui tam* actions, is in force in this State.

This was an action of debt, to recover the penalty given by the act of 1741, ch. 11, to restrain the taking of usurious interest upon money loaned. The usury was received on the 15th of May, 1806, and the writ in this

JULY, 1811.

Williams v. Jones.

case was sued out on the 9th of December, 1807. The Defendant pleaded, among other pleas in bar, the stat. of 31st Eliz. ch. 5, limiting the time within which actions *qui tam* shall be brought; and the Jury found for the Plaintiff, subject to the opinion of the Court, whether that statute of Elizabeth be in force in this state? The question was sent to this Court; and,

BY THE COURT.—The statute of 31st Elizabeth, ch. 5, is in force in this State, and bars the Plaintiff's right of action.*

John Williams
v.
Ambrose Jones.
} From Pitt.

A. gave his bond for the hire of a slave for one year. By the terms of the hiring he was not to employ the slave on water. He, however, did employ the slave on water, and the slave was drowned. He was sued for this breach of the terms of hiring, and the value of the slave recovered against him. In an action on his bond for the hire, judgment given for the whole amount. The hiring shall not be apportioned, because of his breach of promise.

This was an action of debt on a bond given for the hire of a negro slave. By the terms of the hiring, the Defendant was not permitted to employ the slave on water during the time for which he was hired: but he, in

* This case occurred in 1806, and the Court resorted to the statute of Elizabeth, because at that time the General Assembly had passed no general act limiting the time for bringing penal actions. In 1808, they passed "An act to limit penal actions," in which it is declared, "That all actions and suits to be brought on any penal act of the General Assembly, for the recovery of the penalty therein set forth, shall be brought within three years after the cause of such action or suit shall or may have accrued, and not after: Provided, that this act shall not affect the time of bringing suit on any penal act of the General Assembly, which hath a time limited therein for bringing the same."

violation of these terms, employed the slave on water, and the slave was drowned. For this he was sued, and a verdict given for the value of the slave; and now being sued upon his bond for the hire, a question arose, whether the hire should be apportioned, and the Defendant be charged only for the time the slave lived.

JUNE, 1811.

Atkinson v. Foreman.

BY THE COURT.—The Defendant having violated the contract of hiring, must abide by the consequences. He ought not to be relieved from the payment of his bond, because he has thought proper to do an improper act.

Benjamin Atkinson v. Robert Foreman. } From Pitt.

A. petitioned the County Court for leave to keep a public ferry; B. opposed the petition, but the Court allowed it. B. has not the right to appeal to the Superior Court, under the 32d sect. of the act of 1777, ch. 2, which gives the right of appeal in all cases where the party is "dissatisfied with the judgment, sentence or decree of the County Court.

In all cases where a party has a right to appeal, and the Legislature has not prescribed the form of the appeal bond, nor declared to whom it shall be made payable, it is the duty of the County Court to prescribe the form and direct to whom the bond shall be made payable.

Benjamin Atkinson petitioned the County Court of Pitt for leave to erect and keep a ferry across Tar river, at a place where he owned the lands on each side of the river. The granting of this petition was objected to by Robert Foreman; and the County Court having heard the allegations and proofs of the parties, allowed the prayer of the petition. From this decree of the County Court, Foreman prayed an appeal to the Superior Court, which was allowed, and he gave bond with security to prosecute the appeal. In the Superior Court, a

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question was made and sent to this Court, Whether, if the County Court grant to an applicant leave to keep a public ferry at a particular place, another person who claims the right of keeping a ferry near that place, can appeal from the decree of the County Court? On this question the Judges of this Court differed in opinion.

HALL, Judge.—The 32d section of the act of 1777, ch. 2, declares, "That when any person or persons, either Plaintiff or Defendant, shall be dissatisfied with the sentence, judgment or decree of any County Court, he may pray an appeal from such sentence, judgment or decree, to the Superior Court of Law of the District wherein such County Court shall be." This is a very general expression, and would seem to authorise an appeal in every case whatever that can come before a County Court, unless the appeal be taken away. It is true, that in some instances, where by subsequent acts the jurisdiction of the County Courts has been increased, the right of appeal has been expressly given by such acts; and the act which gives the Court jurisdiction of the case now before us, as well as some others, is silent with respect to appeals; and this circumstance is much relied on. We apprehend that the Legislature, by giving the right of appeal in those acts, did so from abundant caution. Certainly no argument can be drawn from the reason of the thing against an appeal in the present case. It is a dispute about property, and it is of as much consequence that justice should be legally administered in this case as in any other. The expression in the act of 1777, is so general as to embrace all cases that can come before a County Court, whether it had jurisdiction of them at the time of the passage of that act, or acquired it since. Suppose the Legislature had not given an appeal in express terms by the act of 1785, ch. 2, which gives to the County Courts jurisdiction in actions of ejectment; would there not be as great, or greater reasons why there should be appeals in such cases, than in actions of which

jurisdiction was given to them by the act of 1777, ch. 2? The Legislature did not think proper at first to trust them with the trial of actions of ejectment, on account of their difficulty: but since they have given to them jurisdiction of such actions, the reason is stronger why there should be an appeal. Were not this reasoning correct, it would be difficult to say on what principle this Court have at this term decided the case of "the State *v.* Washington, (a slave.)" In that case, the County Court refused to grant an appeal: the owner of the slave stated that fact on affidavit, and prayed from one of the Judges of the Superior Courts, a writ of *certiorari*, which was granted. A question was made upon the return of this writ, and sent to this Court for decision, Whether an appeal in that case was a matter of right? and this Court decided in the affirmative. It is worthy of remark, that neither of the acts of Assembly which relate to the trial of slaves, gives an appeal from the County to the Superior Court in such cases. The decision had for its basis, the wide and general expression used in the act of 1777, authorising appeals from every sentence, judgment or decree of the County Courts. It is true, that in that case, one of the Court dissented from the opinion delivered, not because the clause in the act of 1777, was not broad enough to comprehend the case, but for reasons drawn from the different acts of Assembly relating to the trial of slaves. In an anonymous case, reported in 1 *Hayw.* 457, that came before the Court by way of appeal from an order of the County Court, authorising one of the parties to keep a ferry, no question seems to have been made, nor doubt entertained by the Bar or Bench, as to the legality of such appeal. Other cases might be shewn, from which we might infer what the opinions of other Judges were, who have gone before us, although the question was not made and solemnly decided by them. In the case of *Hawkins* v. *The County of Randolph*, (1 *Murphey* 118,) brought to this

JULY, 1811.

Atkinson v. Foreman.

Court some terms ago from the Superior Court of Hillsborough, where the question was, Whether a party dissatisfied with the order of a County Court relative to a road, had the right of appealing? it was urged, that there was no person to whom bond with security could be given for prosecuting the appeal with effect; but it was answered, that if a party has the right to appeal, it is the duty of the County Court, although there be but one party to an order made by them relative to a road or ferry, to point out the mode in which security for the appeal shall be taken; for if the act be substantially complied with, it is sufficient. By the act of 1762, ch. 5, any person dissatisfied with any order made by the County Court relative to a guardianship, with which he may have been interested, or to which he may think himself entitled, has the right of appealing, and yet he is directed to give bond with security for prosecuting his appeal with effect. The same inconvenience would apply in that case; there is no person, or there may be no person but one interested in or a party to such order. But it is the duty of the Court to comply with the act, by directing the manner and form in which such bond shall be taken. And so it is in the case before us. If, however, that objection be good, it cannot apply here; for there are two parties before the Court, one of whom has appealed, and from whom bond has been taken.

It may be said, that the County Courts are better judges of roads, ferries, &c. in their several counties, than the Superior Courts; that questions arising upon the acts of Assembly, which regulate them, are generally questions of fact, of expediency, of convenience or inconvenience to the people of the county. Be it so: when such be the questions, the Superior Courts will interfere very reluctantly. But it must be admitted, that questions of Law will sometimes arise also. Besides, has not experience taught us, that an unpopular, obscure individual, though he may have the better side of the ques-

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tion, has too much cause to dread a conflict with a wealthy, popular antagonist. But

JULY, 1811.

Dunstan v. Smithwick.

BY ALL THE OTHER JUDGES.—It was decided in this Court, at June term, 1806, in the case of *Hawkins* v. *The County of Randolph*, (1 *Murphey* 118,) that an appeal would not lie from an order of the County Court disallowing a petition for laying out a road. This case is not distinguishable in principle from that. The appeal must be dismissed.*

Den on demise of Dunstan
v.
S. Smithwick.
} From Bertie.

A fieri facias issued against A. and was levied on his lands, which were sold by the Sheriff, and conveyed to B, who conveyed them to C; but before his sale and conveyance to C, he contracted to sell the lands to A, who actually paid him the purchase money; and this sale and payment were known to C, before he purchased. In ejectment brought by C, A. shall not be permitted to give in evidence his purchase of the land, and payment of the purchase money, and knowledge thereof by C. This is a defence in Equity, but at Law the only question is, who has the legal title.

The Defendant being seised of the lands in question in right of his wife, a writ of fieri facias was levied thereon, and his interest in the lands sold by the Sheriff, who conveyed to Robert Reddick, the purchaser, and

* In 1813, the General Assembly passed an act amending the acts relative to the laying out of roads and the establishment of ferries. This act prohibits the County Court from laying out any public road, or establishing any ferry, unless upon petition in writing of one or more persons in Court filed, and notice thereof given to all persons over whose lands the road proposed to be laid out, is to pass, or to the person whose ferry theretofore established shall be within two miles of the place at which the petition prays another ferry to be established. This act gives the right of appeal to any person dissatisfied with the judgment, sentence or decree, which the County Court shall pronounce upon such petition.

July, 1811.

The State v. Smith.

Reddick conveyed to Dunstan, the lessor of the Plaintiff. On the trial, the Defendant offered to prove, that Reddick, before he sold the lands to Dunstan, had contracted to sell them to him the Defendant, and that he the Defendant had actually paid him the purchase money, and that Dunstan had full knowledge thereof before he purchased from Reddick. The presiding Judge thought this evidence inadmissible upon the trial of an ejectment, in which the only question was, who had the legal title. A verdict was given for the Plaintiff; and a rule for a new trial being obtained, upon the ground that the evidence offered by the Defendant ought to have been received, the same was sent to this Court.

By the Court.—We concur in opinion with the presiding Judge. It would be a departure from long established principle to go into an examination of equitable claims upon the trial of an ejectment. A Court of Law is not the proper Forum for such an examination. If the Defendant be entitled to relief, he will obtain it upon application to the proper Forum, and obtain it at the costs of the lessor of the Plaintiff. Let the rule be discharged.

The State
v.
Clayton Smith.
} From Rutherford.

Where the Grand Jury return a bill of indictment, "Not a true bill," the prosecutor is bound to pay the witnesses for the State, and one half of the other costs.

A bill of indictment for perjury was preferred against the Defendant, by one William Graham, who was indorsed thereon as prosecutor. The Grand Jury returned the bill "Not a true bill;" and a question arose, Whe-

ther the prosecutor was bound to pay the witnesses for the State? and that question was sent to this Court.

JULY, 1811.

M'Gowen v. Chapen.

BY THE COURT.—The prosecutor is bound to pay the witnesses for the State, and one half of the other costs.

Joseph M'Gowen v. William Chapen. } From Duplin.

A, having hired a slave for a year, placed him, without the consent of the owner, in the employment of B, who cruelly beat him, and greatly impaired his value thereby. *Case* is the proper action for the owner, to recover damages of A.

This was a special action on the case. On the trial, it appeared in evidence, that the Plaintiff hired to the Defendant a negro slave for the term of one year, which slave was, at the expiration of the term, returned ruptured, and greatly impaired in value. The Defendant had, during the term, without the consent of the Plaintiff, hired the slave to a man of the name of Thally, who, with his father, had, whilst the slave was in his employment, beaten him with such severity as to occasion the rupture and consequent diminution of value. The Jury found a verdict for the Plaintiff; and a question was made, Whether an *action on the case* could be maintained by the Plaintiff, and whether *trespass* be not the proper action.

BY THE COURT.—Case is the proper action against the Defendant. Judgment for the Plaintiff.

JULY, 1811.

Den on the demise of Roger Jones and Eunice his wife
v.
James Clayton and John Thomas.
} From Craven.

A, a married woman, being seised of lands, joins her husband in a deed of them to B, who enters and occupies the lands seven years, during the coverture of A, who then dies, leaving C. her heir at law. A. never acknowledged her deed to B; it was proved as to her husband, and registered. B. occupied the lands more than three years after the death of A, without any claim or suit by C. C. was a feme, and with her husband brought suit for the lands after the expiration of three years from A's death. But it did not appear whether she laboured under any disability at the time of A's death. The Court, to avoid deciding the question as to the effect of cumulative disabilities, until it be fairly presented for decision, will presume that C. did not labour under any disability at the time of A's death; and seven years adverse possession having run in the life time of A, and continued for three years after her death, the right of entry of C. and her husband is barred.

The lands claimed in this ejectment were granted to John Tannyhill on the 6th December, 1720. On the 13th February, 1753, Nathan Smith made a deed of bargain and sale in fee of the lands, to Francis Dawson, who devised them to Anne Dawson, 17th February, 1781. Anne Dawson, having married Seldon Jasper, they executed to William Clayton and Nelson Delamar the following instrument, to wit:

"This Indenture, made this 13th day of September, 1798, between Seldon Jasper and Anne Jasper, of the State of North-Carolina and county of Hyde, on the one part, and William Clayton and Nelson Delamar, of the State aforesaid and County of Craven, of the other part, witnesseth, that for and in consideration of the sum of four hundred Spanish milled dollars, to the said Seldon Jasper and Anne Jasper in hand paid by the said William Clayton and Nelson Delamar, at the sealing and delivery of these presents, the receipt whereof is fully acknowledged, we the said Seldon Jasper and Anne Jasper have granted, bargained and sold, and by these presents do grant, bargain and sell unto William Clayton and Nelson Delamar, all our right, title and interest in a certain piece or tract of land, situate, lying and being on

the north side of Neuse river, and partly at the mouth of said river, it being the whole of that parcel or piece of land which was left by will by Francis Dawson, senior, to the said Anne, generally known by the name of the Gum Thicket, containing by estimation three hundred acres, be the same more or less. And we the said Seldon and Anne Jasper do warrant and defend the aforesaid granted lands and premises from him the said Seldon Jasper and Anne Jasper, their heirs, executors, administrators and assigns forever, from the lawful claim of any other person. In testimony whereof, we have hereunto set our hands and affixed our seals, the year and date above written.

SELDON JASPER, (SEAL.)
ANNE JASPER, (SEAL.)

In presence of
FRANCIS DELAMAR,
CHRISTOPHER DELAMAR."

"State of North-Carolina—Craven County Court—March term, 1804. Then was the within deed proved in open Court, by the oath of Francis Delamar, one of the subscribing witnesses thereto, and ordered to be registered.

Teste, SAML. CHAPMAN, C. C.

"I certify that the within deed is correct agreeably to the Register's office of Craven county—Book Z, page 317.

Teste, THOS. L. CHEEKE, Reg'r."

The wife of said Jasper never acknowledged the said deed, had no children, and died in February, 1806, leaving the Plaintiff her heir at law, and her husband Seldon Jasper yet living. The question submitted to this Court was, Whether a possession of seven years by Delamar and Clayton, under the aforesaid deed, before the death of Anne Jasper, and three years thereafter without claim or suit, bars the right of entry of her heir at law, Eunice, the wife of Roger Jones?

Gaston, for the lessors of the Plaintiff.—It appearing that the lands have been granted, the State has no title to them. The heirs of Tannyhill can have none, by reason of Smith's conveyance to Dawson, and seven years adverse possession under that conveyance. The Defendant has no title, because his possession was not

JULY, 1811.

Jones v. Clayton.

adverse to Mrs. Jasper, she being a married woman. The title, then, must be in the lessors of the Plaintiff; otherwise there is no owner. The conveyance to the Defendant is but the conveyance of Jasper; it is a bargain and sale, and therefore passes only what might lawfully pass, viz. an estate during coverture—(*Bac. Ab. Bargain & Sale, A.* 466-7—*Litt.* 606-7-8-9.) The Defendant is not at liberty to controvert Mrs. Jasper's title; he claims under it—(*New-York Term Rep.* 398.) But,

BY THE COURT.—It doth not appear in the statement of the case, whether Eunice, the heir at law of Mrs. Jasper, was of full age, or covert at the time of Mrs. Jasper's death. Although the fact be not stated in the case, yet it is admitted by the parties, that Clayton and Delamar had seven years possession of the lands before the death of Mrs. Jasper. The character of their possession is evidenced by the deed under which they claimed. It is also admitted, that this possession was continued for more than three years after Mrs. Jasper's death. If, instead of the death of Mrs. Jasper, she had become discovert, the act of 1715, ch. 27, gave her three years after her discoverture to bring her suit or make her entry. What time shall be allowed to her heir at law? It is said, if at the time the descent is cast, the heir labour under disability, the statute of limitations shall remain suspended during the disability; so that if Eunice was married to Roger Jones at the time of Mrs. Jasper's death, she shall have during all the coverture and three years thereafter, to bring her suit or make her entry or claim, notwithstanding seven years adverse possession had run in the life-time of her ancestor, Mrs. Jasper. This would at once present the question of cumulative disabilities to the Court; a question which will not be decided until it be fairly presented. It would be wrong to decide it in this case by assuming facts which

are not in proof. As the verdict and judgment in this case is not conclusive upon the rights of the parties, the Court will rather presume that Eunice laboured under no disability when Mrs. Jasper died, and that this suit being instituted more than three years after that event, her right of entry was barred by the adverse possession of the Defendants. Judgment for Defendants.

JULY, 1811.

Campbell v. Campbell.

Duncan Campbell v. Daniel Campbell. } From Robeson.

A. B, and C. are tenants in common of certain negro slaves. B. takes possession of the slaves, and A. demands of him to deliver over to him one-third of them. B. refuses, and A. brings an action of trover against him to recover the value of one-third of the slaves. This action cannot be maintained.

This was an action of trover to recover one-third of the value of a slave. On the trial it appeared in evidence, that the Plaintiff and Defendant were brothers, and they, with another brother, purchased a negro woman for the purpose of waiting upon their mother during her life. After her death, the negro woman went into the possession of the Defendant, she then having several children. The Plaintiff called on the Defendant and demanded his share of the negroes; the Defendant refused to deliver them over, and thereupon he brought this suit. The Defendant insisted, that he being a tenant in common with the Plaintiff of the negroes, trover would not lie against him for the Plaintiff's third part; and this objection to the Plaintiff's recovery was sent to this Court.

BY THE COURT.—This action cannot be maintained in the present case. Let a nonsuit be entered.

JULY, 1811.

John Taylor
v.
Robert Grace and others. } From Wayne.

An action of debt will not lie against heirs upon a bond of the ancestor in which they are not expressly bound.

James Grace gave a bond to John Taylor in the following words, to wit:

"On demand, I promise to pay or cause to be paid unto John Taylor, his heirs or order, the sum of fifty-six pounds, twelve shillings, specie, with lawful interest till paid, it being for value received, as witness my hand and seal, this 27th July, 1796.

JAMES GRACE, (SEAL.)"

James Grace having died, Taylor brought an action of debt on this bond against the Defendants, who were his heirs at law: and upon the trial, the presiding Judge nonsuited the Plaintiff, on the ground that the obligor had not bound his heirs to pay the debt.

BY THE COURT.—There can be no doubt upon this point. The nonsuit was regular and must stand.

JULY, 1811.

Don on demise of Moses Langston
v.
Richard M'Kinnie.
} From Wayne.

A. having entered a tract of land, conveyed it to B. in 1780, and to C. in 1784. In 1782 the land was surveyed, and the grant from the State issued in 1792. C. had possession of the land under the deed to him, for seven years, before the grant issued, and B. brought an ejectment against him for the land. He cannot recover; for

1. If the grant had relation back, so as to vest the legal title in B. as from 1780, the seven years adverse possession of C. would bar his right of entry; but,

2. The grant shall enure by way of estoppel to the benefit of B, so as against A. to give him a legal title as from 1780, because of the privity of estate between them: yet there being no privity between B. and C, the estoppel cannot operate, and B. sets up against C. a title derived from one who had only an entry; for the title remained in the State until 1792. A Court of Law cannot take any notice of B's title in an ejectment against any other person than A; and as to A. he would be estopped to deny it.

This was a special verdict, in which the Jury found, that Risdon Nicholson conveyed the lands in question to Jacob Langston, on the 8th August, 1780; that Jacob Langston devised the same to the lessor of the Plaintiff, on the 25th December, 1784, and shortly afterwards died. That a grant from the State, for the lands, issued to Risdon Nicholson on the 10th April, 1792, the survey of which bears date the 10th June, 1782. That Risdon Nicholson conveyed the same to Thomas Daughtry, on the 24th December, 1783, who conveyed the same to Frederick Hering, on the 7th January, 1784. That Frederick Hering, by his will, empowered his executors to sell, and on the 20th November, 1805, he being dead, they sold and conveyed the lands to the Defendant. The Jury further found, that Frederick Hering, and those claiming under him, had possession of the lands for seven years from the 4th June, 1784.

JULY, 1811.

Langston v. M'Kinnie.

BY THE COURT.—The grant issued in 1792, to Risdon Nicholson, enured by way of estoppel to the benefit of those claiming under him by conveyances made anterior to that time; and the conveyance to Jacob Langston being prior in time to the conveyance to Daughtry, would prevail, were it not for the seven years adverse possession which those claiming under Daughtry have had of the lands. This possession would bar the right of entry of the lessor of the Plaintiff, if the grant had relation back, so as to vest the legal title in any one having a conveyance from Nicholson anterior to the issuing of the grant. But could the grant relate back so as to produce such effect? As between Nicholson and either the lessor of the Plaintiff or the Defendant, the grant shall be considered as producing this effect; for as to the first, Nicholson would be estopped by his deed of 1780, from denying that he had not the legal title to the lands at that time; and as to the second, he would be in like manner estopped from denying that he had not the legal title to the lands in 1784. But the estoppel operates only between parties and privies. There is no privity between the lessor of the Plaintiff and the Defendant; and what is the title which the lessor of the Plaintiff sets up? A deed from a man who at the time he made it, had no title that a Court of Law can take notice of; he had a mere entry, and the legal title remained in the State for twelve years afterwards. This title would by way of estoppel prevail against Nicholson, were he the Defendant; but it shall prevail in this Court against no one else. The condition of the Defendant would be the same as that of the lessor of the Plaintiff, were he out of possession and should bring suit to recover it. He could recover against no one, in an ejectment, except Nicholson. So that *quacunque via data*, the Plaintiff cannot recover.

JULY, 1811.

The State
v.
Joseph Gregory. } From Wilkes.

On the trial of an indictment for perjury, charged to have been committed in an oath taken before a company court-martial, it is not necessary to produce the commission of the Captain: parol proof of his acting as such is sufficient.

The Defendant was indicted for perjury, charged to have been committed in an oath taken before a company court-martial, for the purpose of getting a fine remitted. On the trial a question arose, Whether the commission of the senior officer of the Court ought not to be produced, to prove his grade as an officer and that the court was legally constituted? The presiding Judge thought that it was not necessary to produce the commission, and received parol proof of the grade of the officers and of the constitution of the court. The question being sent to this Court, it was decided

BY THE COURT—That it was not necessary to produce the commission of the Captain: that parol proof of his acting as such was sufficient.*

* The Solicitor for the State relied upon 4 Hawk. 432, Title *Evidence*—and 2 M'Nally 485 to 488, and the authorities there cited.

JULY, 1811.

James Taylor
v.
Taylor and Justice. } From Craven.

Case of Partnership. If an agreement for a common or special partnership appear to have existed between parties for the purchase of property, with intent to sell the same for the profit of the parties, and no express agreement be proved adjusting the division or share of the profits, the Law extends the concern to all the goods purchased by either of the parties; and the parties are entitled to share the profits, without regard to the payments or advances made by either for the purpose of effecting the purchase, if there be no contract as to the amount of the advances to be made by them respectively.

The bill charged, that Complainant, in January preceding the filing thereof, had introduced to Defendants, merchants and copartners in trade, in the town of Newbern, under the firm and style of "Taylor & Justice," a Capt. John Thomas and a Capt. Emanuel Roderique, whose vessels had lately before been cast away and wrecked at Ocracock Inlet, requesting them to aid those gentlemen in the transaction of their business at the custom-house, and observing that as there was a probability that some advantageous purchases might be made of the vessels or cargoes, the Complainant with Taylor & Justice should be mutually and equally concerned in the purchases, that is, that Taylor & Justice should be interested one-half and Complainant the other half in all the purchases to be made, and in all the profits and emoluments, of whatever kind, that should thence be derived. That Taylor & Justice acceded to this proposition, and in order to enable Complainant more readily and beneficially to go on with the proposed speculation, it was agreed that he, instead of paying off the sum of £94 8s. 7d. which he owed Taylor & Justice on a running account, should pass his note for the same, and invest the amount thereof, and also the amount of the duties on the said Thomas's cargo, in such advantageous purchases

as might offer at Thomas's sale, (the Complainant being the Surveyor of the Port of Beacon Island.) That in consequence of this agreement, Complainant went to Ocracock, attended the sale, made very advantageous purchases to the amount of $515, in rum, sugar and molasses, and about the first of February returned to Newbern with the articles so purchased, which he delivered to Taylor & Justice, to be sold for his and their benefit, and also the sum of $294 in cash, making in the whole the sum of $809, the exact amount of duties secured on the said Thomas's cargo. That for these duties Taylor & Justice had given their bond at the custom-house, payable in three and six months, and in consequence of the aforesaid agreement, Complainant was responsible for a moiety thereof. That at the same time, he put into the possession of Taylor & Justice, about forty boxes of Spanish segars, and three or four hundred bundles of Spanish tobacco, which he had detained in consequence of the duties thereon not being paid or secured; but that shortly afterwards, the duties on these articles and on the whole of Capt. Roderique's cargo were secured, and the owners of these articles being introduced by Complainant to Taylor & Justice, Complainant consulted with Taylor & Justice about the purchase of them, and assisted them to make the purchase; that the amount of the duties on these articles, viz. $92, was deducted, and the residue paid, partly in money and partly in goods furnished by Taylor & Justice. That the purchase of the segars and tobacco was made, as well as the former purchases and those intended to be made thereafter, equally on account of Complainant and of Taylor & Justice, and in pursuance of the agreement before set forth.

June, 1811.

Taylor v. Taylor.

That about this time, Capt. Roderique having concluded to sell his cargo, and being desirous of employing Complainant to manage the business, as his agent and as agent for all concerned, and allow him a regular commission for the agency, proposed to Complainant to undertake it; he declined, and recommended to this agency

JUNE, 1811.

Taylor v. Taylor.

Taylor & Justice, promising Capt. Roderique to give them his assistance. Complainant, on behalf of Capt. Roderique, applied to Taylor, one of the partners, offered his aid and expressly stipulated for an equal division of the commissions and of all the profits and emoluments that might arise from the transaction. This offer and stipulation being acceded to, the agency was undertaken, and Complainant charged that he accordingly did aid in the agency. That Taylor, one of the partners, proceeded with Complainant and Capt. Roderique to Beacon Island, to attend the sales of Capt. Roderique's brig and cargo, and in pursuance of the agreement entered into by himself and partner with Complainant, made purchases to the amount of $2000, or thereabouts, and took the property purchased into possession. That having returned to Newbern with a considerable part of the property purchased, they found an agent of the owners, to whom Complainant explained all that had been done, and paid to him $500. That Taylor and Justice paid the residue, retaining $191 for commissions.

That knowing large profits had accrued from the speculation, which profits were entirely in the hands of Taylor & Justice, Complainant applied to them for an account thereof, and payment of his share: and that Taylor & Justice denied his right to *an equal participation* of the profits, saying that Complainant had not made *equal advances* with them, and was entitled to profits only in proportion to the advances which he had made, and insisting that his running account for which he had given his note as aforesaid, should be deducted from his advances, and that they should be credited exclusively by the expenses of the speculation out of the profits realised, although the expenses were not then paid. That they then agreed to submit the matter in controversy between them to the arbitrament and award of John Devereux and John Harvey, merchants of Newbern; and in pursuance of this agreement, they submitted to the said arbitrators, "Whether Complainant's advances had been

such as to entitle him to a full moiety of all the profits arising from the purchases and speculations before set forth;" and the arbitrators, after hearing the allegations of the parties, and examining their documents, were of opinion that Complainant was so entitled. The bill then charged, that Complainant had often applied to Taylor & Justice for a settlement of the account, and payment of his share of the profits, and they had refused to make such settlement and payment. The bill prayed for an account and relief, &c.

JULY, 1811.

Taylor v. Taylor.

The answer of the Defendants admitted, that Complainant proposed to them that they should become bound at the custom-house, for the duties upon the cargoes of the vessels, and that he and they should jointly purchase at the sale of the wrecked property, and equally divide the profits arising therefrom: but they denied that they acceded to the proposition of an equal concern and division of profits in whatever purchases might be made beyond the sum of duties secured. They admitted, that to the amount of the duties, Complainant was to be entitled to an equal share of the profits, but alleged that in case the purchases exceeded the amount of duties, the benefit was to belong exclusively to that party by whom the advances for such purchases were made: and that in cases of purchases on their joint account, the property should be placed in their hands, and the disposal thereof be wholly under their direction: and that whenever they should supply the funds to make purchases at said sales beyond the amount of duties secured, and should not themselves attend the sales, but leave the management of the business to Complainant, he was to be entitled to an equal part of the profits arising from the purchase, as a compensation for his services in making the purchases: that if, when they or either of them attended a sale, and intended to purchase beyond the amount of the duties secured, Complainant thought proper to meet them with equal funds, he was to share equally in the

JULY, 1811.

Taylor v. Taylor.

profits of such purchase; otherwise, in proportion to the sum which he should advance.

As to the running account of Defendant for £94 8s. 7d. Defendants answered, that the same had been long due, and they were pressing Complainant for payment; but he, alleging that he wished to apply some money in purchases for his own benefit at the said sales, they proposed, and Complainant agreed to it, that Complainant should retain the sum of £94 8s. 7d. and give them, not his note, but an accountable receipt for that sum; that he should invest the money in purchases at the said sales, and in consideration of his doing the business and making the payment at the sale, he should be entitled to half the profits on the purchase made with that sum; and this was done, not in consequence of a general agreement of equal concern in all purchases at the contemplated sales, but merely to close Complainant's account.

They stated, that they gave Complainant instructions in writing, at the first sale, to invest the amount of Thomas's duties in purchases, pointing out the articles which he should buy and the prices he might venture to give. At this time it was not known that Roderique's vessel and cargo would be sold; but expecting that a sale might take place, Complainant was instructed to invest the amount of Roderique's duties in such purchases; and they informed him that the profits arising from his purchases to the amount of the duties, should be equally divided between them and him.

They admitted, that upon Complainant's return to Newbern, he delivered to them the rum, sugar and molasses charged in the bill, but they denied that he paid them $294 in cash, or any other sum. Capt. Thomas paid this money, which, with the articles purchased by Complainant, made up the amount of duties which Capt. Thomas owed, and for which they had given their bond at the custom-house; and upon his making this payment, they gave him a discharge. They denied that

there was any agreement that Complainant should be responsible for one-half of the duties.

They admitted, that in February there were deposited with them, under the inspection of Complainant, Capt. Roderique and his seamen, thirty-nine boxes of segars, belonging to the Captain, and thirty-one boxes and one bocket of segars, and four bags of tobacco, belonging to the seamen. On the 11th of that month, the seamen called at their store and offered to sell their segars and tobacco. They were foreigners, and there was a difficulty in understanding them. Complainant came in and acted as interpreter, and a bargain was concluded. They denied that Complainant was entitled to any participation in that purchase; that he either introduced the seamen to them or had any agency in making the bargain, except in acting as interpreter. That neither he nor they was precluded, by any agreement between them, from employing any sum which either might think proper to advance, in purchases of wrecked property, while there remained sufficient to invest the amount of duties on their joint account; and Complainant purchased for his own use, of Capt. Roderique, articles to the amount of $103.

They admitted their agency for Capt. Roderique, but expressly denied any agreement that Complainant was to share the commissions. They agreed that in consideration of his having recommended them to the agency, he should have the profits which would arise from purchases to the amount of the commissions. They admitted the purchases at Capt. Roderique's sale, the delivery of the goods in Newbern, the arrival there of the agent of the owners, the settlement with him, the amount of commissions received, and the payment to them of $500 by Complainant.

As to the award charged in the bill, the Defendants gave a history of it, and insisted that it was not in any way binding on them.

JULY, 1811.

Taylor v. Taylor.

Upon the hearing of this case, the following issues were submitted to a Jury, to wit:

1. Was there an agreement between the Complainant and Defendants, as to the division of the profits to arise from the purchase and sale of the articles in Complainant's bill set forth: and what was that agreement?

2. Was there any agreement as to the division of the commissions on the agency for Roderique's vessel; and what was that agreement?

3. Was there any award which settles the principles on which a division of profits should be made; and what was that award?

The Jury found that there was an agreement between the Complainant and Defendants as to the division of the profits mentioned in the first issue; and that agreement was, that the said profits should be equally divided between the Complainant on the one part, and the Defendants on the other. They further found there was no agreement as to the commissions mentioned in the second issue; and that there was no such award as is mentioned in the third issue.

The presiding Judge, in his charge to the Jury, said, that if an agreement for a common or special partnership appeared to have existed between the parties for the purchase of any property at the sales set forth in the bill and answer, with intent to sell the same for the profits of the parties, and no express agreement was proved, adjusting the division or share of the profits, the Law was, that the concern extended to all the goods purchased by one of the parties at the time of the sales, and that the parties were entitled equally to share the profits, without regard to the payments or advances made by either of them for the purpose of effecting the purchase, there being no contract as to the amount of the advances to be made respectively. A rule for a new trial was obtained, on the ground that the charge was incorrect in Law. The rule was sent to this Court; and

BY THE COURT.—The presiding Judge laid down the Law correctly in his charge to the Jury. The rule must be discharged.

Den on the several demises of John C. Osborn and John Stanly v. John Coward. } From Craven.

Question of evidence. In ejectment the Plaintiff claimed title under a grant issued in 1707, for 640 acres. The beginning corner called for in the grant was, "a poplar on Trent river, thence 320 poles to a pine," &c. On the trial, he contended his beginning corner was 400 poles from the poplar, and the second corner 400 poles from the pine; and to prove it, he offered to lay before the Jury the record of a petition filed by one of the old proprietors of the land, before the Governor in Council, praying for a re-survey, the order in Council for a re-survey, directed to the Surveyor-General, and the re-survey made in pursuance thereof in 1768. Held, that the record of this petition and re-survey is not admissible in evidence.

The lessors of the Plaintiff claimed the lands in question under a grant issued to Frederick Jones, in the year 1707, in which the boundaries are described as follows, to wit: "Beginning at a poplar on Trent river, running thence west 320 poles to a pine, thence north 320 poles to a pine, thence east 320 poles to the river at a Spanish oak, and with the river to the beginning, containing 640 acres." They contended that the beginning corner stood at the distance of 400 poles from the poplar, and the second corner 400 poles from the pine. To support this pretension, they prayed for leave to give in evidence the record of a petition of Edward Frank, a former proprietor of the land, to the Governor and Council, in the year 1769, praying for an order of re-survey, and also the re-survey authorised and made pursuant thereto, in the words and figures following, viz:

JULY, 1811.

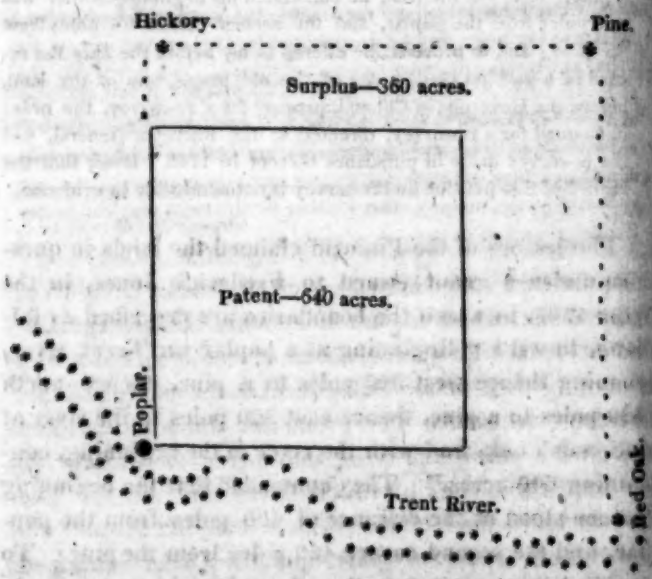
Osborn v. Coward.

"At a Council held at Wilmington, on the 28th April, 1769—present his Excellency the Governor in Council. Read the petition of Edward Franks, setting forth that his father, Martin Franks, in his lifetime, purchased from Frederick Jones a certain tract of land granted by patent to the said Jones, in the year 1707, for 640 acres, in Craven county, on the north side of Trent river, called the White Rock; the courses and distances of which patent will not extend as far as the natural bounds and marked lines of the original survey. Whereupon the petitioner prayed an order to re-survey the same agreeably to the known bounds and marked lines; that if there should be found a surplusage, the said petitioner might have the preference to secure the same in such a manner as his Excellency in Council shall hereafter direct.—Ordered a warrant of re-survey to issue, according to the prayer of the petition.

A true copy,

JNO. LONDON, D. Sec'y.

To the Surveyor-General."



"The above Plan represents a tract of land patented by Frederick Jones, in the year 1707, for 640 acres, in Craven county, called the White Rock, surveyed by virtue of a warrant of re-survey, issued at Wilmington the 28th April, 1768.

L. LANE, D. Surv'r.

Re-surveyed this 24th November, 1768."

The presiding Judge refused to receive the evidence offered; whereupon the Plaintiff suffered a nonsuit; and it was referred to this Court to decide, Whether the said petition and re-survey were admissible in evidence?

By the Court.—The evidence offered was inadmissible. Rule for a new trial discharged.

John Sutton and wife
v.
James Burrows.
} From Martin.

Dower. The rents which accrue before the assignment of dower, belong to the heir: but he is answerable over to the widow for them, as damages for not assigning her dower. The remedy for the widow to recover these damages, is by petition for a writ of dower, and praying therein to have the damages assessed. The Court will order an issue to be made up between her and the heir, and submitted to a Jury. The widow cannot maintain an action on the case against the heir, nor any other person, for the rents received before the assignment of dower.

David Perry died seised of certain lots in the town of Williamston, which his administrator, the present Defendant, leased for three years, and received the rents, amounting to £70 5*s*. Subsequent to the making of this lease, the widow of Perry married John Sutton, and they filed a petition praying that her dower might be laid out in the lands of which Perry died seised. The Jury included the lots aforesaid in her dower, and returned their report to Court, and the Court confirmed it. The Jury also included the dwelling-house and outhouses of Perry in the dower, and the widow occupied the dwelling-house until her marriage, and her husband and herself afterwards occupied it until the dower was laid out. Sutton and wife then brought an action on the case against Burrows, to recover the rents aforesaid,

JULY, 1811.

Sutton v. Burrows.

which he had received; and the question was, Whether the action could be maintained?

Browne, for the Plaintiffs.—When the writ of *novel disseisin* was given, the strictness of the feudal system was wearing out, and damages were allowed to be given; and about the same time, damages were allowed in most of the other real actions where the freehold was demanded—(3 *Bl. Com.* 185.) At that time, the action of ejectment was used only for the recovery of terms for years. When this action came into general use for the recovery of the freehold, nominal damages only were given; but the Law applied a new remedy, by giving the action of trespass for the mesne profits. The writ of dower was then used as a real action, and by the statute of Merton, damages were given to the demandant in the writ—(*Co. Lit.* 32, *b. note.*) Under this statute, damages are recovered not according to the value of the land, but of the rents. As other real actions have given way to the action of ejectment, so the writ of dower has given way to the petition for dower, under the act of Assembly: and as in ejectment the Courts have applied the action of trespass to recover the mesne profits, why, in the petition for dower, will they not apply the flexible remedy of the action on the case, to recover the rents and profits which the widow is entitled to from the time she ought to have been endowed?

Daniel, for the Defendant.—Before the statute of Merton, no damages were given in the writ of dower. That statute was intended to compel the heir to make a speedy assignment of dower. The action on the case would not lie even against the heir. If the widow claim damages, she must set up her claim in her petition for dower, and the Court will direct an issue to be made up between her and the heirs, on which the Jury will assess damages. The present suit is brought against the administrator,

who leased the lands and received the rents. If he received the rents, for whose use did he receive them? Surely for the use of the heir, upon whom the land had descended. For until the assignment of dower, the entire freehold was in the heir. Will the assignment of dower have relation back to the death of the husband, so as to affect the Defendant, who in the interim has received the rents? Do not the profits follow the freehold as a necessary incident? The widow is entitled to the rents, but she must look to the heir for such as accrued before the assignment of dower; for he in contemplation of Law has received them. But she cannot recover even against the heir in this action: She must, in analogy to the proceedings under the statute of Merton, have damages assessed upon her petition for dower.

BY THE COURT—It is the duty of the heir to assign dower to the widow within a reasonable time after the death of her husband. If he fail to do it, she shall, upon petition filed for that purpose, have her dower assigned by a Jury; and if she claim damages for the detention of her dower, she must inform the Court of that fact in her petition, (to which the heir must necessarily be a party,) and the Court will order an issue to be made up and tried between her and the heir, and the damages to be assessed. The rents are necessarily incident to the freehold, and go to the heir until dower be assigned. The rents now claimed belong to the heir, as they accrued before the assignment of dower. But the heir is not liable to the widow for the rents in an action on the case. He is liable upon her petition given by the act of Assembly, in analogy to the proceedings under the writ given by the statute of Merton; and there the widow recovers, not rents, (which suppose a privity of estate) but damages for the detention of her dower; in assessing which, the value of the rents is the proper guide to the Jury. Judgment for the Defendant.

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JULY, 1811.

Den on demise of Thadeus Pendleton
v.
George Pendleton.
} From Pasquotank

Executory devise. A. devised to her son B. one part of a tract of land, and to her son C, the other part, and directed, *that if either of them died, leaving no heir lawfully begotten of his body, the living son should be the lawful heir of all the land.* B. died without issue. Held, that C. was entitled to the lands under the limitation.

Sarah Pendleton, being seised of the lands in question, devised them as follows, to wit: "I give unto Benjamin Pendleton, my eldest son, this end of a plantation whereon I now live, divided by a ditch from the creek swamp to the road; and one-half of the land I bought of James Jackson. I give to my son Thadeus Pendleton, the remaining part of this land whereon I now live, and the remainder of the land I bought of James Jackson: *and if either of my sons dies, leaving no heir lawfully begotten of his body, the living son shall be the lawful heir of all the land.*" Benjamin, one of the brothers, died without issue, having made his will and devised his interest in the lands to his wife Sarah Pendleton, under whom the Defendant entered and took possession; and the question in the case was, Whether the limitation over to Thadeus Pendleton, the lessor of the Plaintiff, be good?

HALL, Judge, delivered the opinion of the Court:

From the particular words used in the clause of the will now under consideration, it may be fairly inferred, that the meaning and intention of the testatrix was, that if either of her sons should die, leaving no heirs lawfully begotten of his body at the time of his death, the living son should be the lawful heir. The words "the living son shall be the lawful heir," mean the same as if she had devised the lands to Benjamin in fee, but in case he died without leaving heirs lawfully begotten of his body,

living, or during the life of Thadeus, then Thadeus to be the lawful heir. In this case, the dying without heirs would be tied up to the time of the death of Benjamin, and of course not too remote. The case before the Court is very much like the case of Pells *v.* Brown, (*Cro. Jac.* 590,) where it was decided, that a devise in fee to A, and if he die without issue in the life-time of B, then to B. and his heirs, was a good executory devise, to take effect on the contingency of A's dying in the life-time of B. without issue. The principle of that decision has been approved in the cases of Patton *v.* Bradly, (3 *Term* 145,) and Roe *v.* Jeffrey, (7 *Term* 589.) In the case of Hughes *v.* Sayer, (1 *P. Wms.* 534,) a devise of personal estate to A. and B, and if either die without children, then to the survivor, was held good. Let judgment be entered for the Plaintiff.

JULY, 1811.

Den on demise of George W. L. Marr and others
v.
Thomas Peay and others.
} From Rowan.

Power of executors to sell lands. Presumed renunciation of an executorship. A. being seised in fee of lands, and possessed of personal estate, made his will, and directed "his executors therein named, to pay and discharge all his just debts, and to sell and dispose of whatever they might think proper and best of his estate, to satisfy his debts." He appointed B, C, and D, executors, and died in 1778. B. and C. qualified, and undertook the execution of the will. D. never qualified, nor intermeddled with the estate, nor formally renounced the executorship. In 1798, B. and C. sold the lands to pay the debts, D. being alive and not refusing to join in a deed to the purchaser. Held, that the deed of B. and C. was good to pass the title, they being answerable to creditors for the debts, and the testator having left it to the discretion of his executors to pay the debts out of any part of his estate they might think proper. The power to sell is attached to the executorship, and not to the persons named executors.

The Court will presume a renunciation after such a lapse of time. A formal renunciation in open Court is not necessary; it only affords easier proof of the fact.

John Hunter, being seised of the lands in question, devised as follows, to wit: "I order my executors hereafter named to pay and discharge all my just debts, and that they sell and dispose of whatever they think proper and best of my estate, to satisfy my said debts." He appointed Alexander Martin, James Martin, James Hunter, John Tate and Edward Hunter, executors of his last will, which was proved in Guilford County Court, at February term, 1778, and James Martin, James Hunter, John Tate and Edward Hunter qualified as executors. Alexander Martin never qualified, nor in any way intermeddled with the estate of the testator, nor did he ever formally renounce the executorship. John Tate and Edward Hunter having died, James Martin and James Hunter, the surviving acting executors, in the year 1798,

Marr v. Peay.

for the purpose of raising money to discharge the testator's debts, sold the lands in question, and by a deed of bargain and sale conveyed them to the lessors of the Plaintiff, Alexander Martin being then alive, and having not refused to join in the conveyance. The question submitted to this Court was, Whether, as Alexander Martin had neither formally renounced the executorship, nor joined, nor refused to join in the sale and conveyance of the lands, the lessors of the Plaintiff were entitled to recover?

BY THE COURT.—The lands in question were sold to pay the debts of the testator. He did not set apart a particular portion of his estate for the payment of his debts: he has left it to the discretion of his executors to pay his debts from the sales of any part of his estate. The executors are to pay the debts; creditors look only to such of them as undertake the execution of the will; and it seems necessarily to follow, that those who qualify and undertake the execution of the will, shall be competent to do what the will directs to be done. The power to sell is attached to the executorship, not to the persons named as executors. But were it otherwise, the Court will necessarily presume, after such a great lapse of time, that Alexander Martin has virtually renounced the executorship. A formal renunciation in open Court is not indispensible; it only provides an easy method of proving the fact. Other evidence may be equally satisfactory; and none could be more so, than lying by for the space of twenty years, and during that time never intermeddling with the estate. Let judgment be entered for the Plaintiff.

JULY, 1811.

William Exum
v.
The heirs of Benjamin Sheppard. } From Craven.

Judgment being given for an administrator, upon the plea of "fully administered," a scire facias issued to the heir, to shew cause why judgment of execution should not be had against the real estate descended. The heir pleaded "nothing by descent," and afterwards, pending the suit, he pleaded, "that since the last continuance, the lands had been sold to satisfy other executions." The Plaintiff demurred: and the demurrer was sustained.

The Plaintiff recovered against James Glasgow and Martha Jones Sheppard, administrators of the estate of Benjamin Sheppard, deceased, in the County Court of Greene, in an action of covenant, £ for damages and £ costs of suit; but the plea of "fully administered" was found for the Defendants. The Plaintiff then sued out a writ of *scire facias* against the Defendants, suggesting that the said Benjamin Sheppard died seised of a large real estate, which descended upon the Defendants, as heirs at Law, and praying for execution of the said damages and costs against the real estate to them descended. Upon the return of this writ, the Defendants appeared and pleaded several pleas, amongst which were, "no such record, and nothing by descent:" and issues being joined upon said pleas, they were all found for the Plaintiff. The Defendants being dissatisfied with the verdict, appealed to the Superior Court for Newbern District. The transcript of the record was filed by the Defendants in due time, and the case stood upon the docket of the Superior Court, for trial upon the issues joined in the County Court, until January term, 1804, when the Defendant's counsel, as of course, and without motion to the Court, pleaded, "that since the last continuance, the lands have been sold to satisfy other executions issued from this Court:" to which plea the Plaintiff demurred, and the Defendants joined in demurrer.

At July term, the issues joined between the parties in the County Court, were tried and found for the Plaintiff: and the issue in Law joined between the parties, was sent to this Court. And

BY THE COURT.—Let the demurrer be sustained.

Laurence Wood
v.
John Atkinson. } From Wayne.

A. employed B. as an overseer, and agreed to give him a certain part of the corn and hogs which should be raised on the plantation during the year. Before the corn was gathered, or hogs divided, B. conveyed his interest in them to C, who, in the month of November of that year, the corn being then gathered, demanded of A. the share to which he claimed title under his conveyance from B. A. refused to deliver it, and C. brought an action of trover. Held, that the action would not lie; for the contract between A. and B. continued *executory* until B's share of the corn and hogs was set apart by A.

This was an action of trover, in which the Plaintiff claimed to recover the value of certain corn and pork, which he alleged belonged to him, and which Defendant had converted to his own use. The facts of the case were as follow. Atkinson, the Defendant, employed one John Lindsay as an overseer for the year 1806, and agreed to give him a certain portion of the corn and hogs which should be raised on the plantation in that year. In September of that year, Lindsay sold and conveyed to Wood, the Plaintiff, all his undivided share of the corn and hogs. When Lindsay gathered the corn, in October, he deposited a part for himself in one place, and a part for Atkinson in another; but no consent of Atkinson to such division appeared, except an inference which might be drawn from his calling the corn which Lindsay had deposited in a place for himself, "Lindsay's

JULY, 1811.

Wood
v.
Atkinson.

corn." No division of the hogs was made, but Atkinson stated, in December, that Lindsay's share was a certain number. In November, 1806, Wood demanded of Atkinson, the corn and hogs to which Lindsay was entitled: Atkinson refused to deliver them, and thereupon Wood brought this suit. Upon the trial, the presiding Judge was of opinion that the Plaintiff could not maintain the action, and a nonsuit was suffered. A rule for a new trial being obtained, was sent to this Court; and

BY THE COURT.—In this case, there was no evidence that Lindsay's share of the corn and pork had been set apart for him by Atkinson, and while so set apart, that the conveyance to the Plaintiff was made. Before the Plaintiff can recover, he must shew that the share of Lindsay had been set apart, otherwise the case would rest upon the mere contract of the parties. He must shew, in the next place, that after Lindsay's share had been so set apart, it was conveyed to him, and before any conversion thereof was made by Atkinson. The evidence does not support either part of the case, and the nonsuit was proper. Let the rule for a new trial be discharged.

JULY, 1811.

Richard B. Jones and Frances his wife
v.
Richard D. Spaight and others.
} From Craven.

Bringing lands into hotchpot. A. being seised of divers tracts of land, died intestate, leaving two daughters, B. and C, his heirs at law. B. intermarried with D, and A. conveyed to *B. and her heirs*, four tracts of land; to *D. and to his wife B. and their heirs*, three tracts of land; to *D. and his heirs*, two tracts of land. Some of the deeds purported to be made for a small pecuniary consideration; others of them purported to be made for natural love and affection; and others for natural love and five shillings. Held, that in making partition of the lands of which A. died seised,

1. The lands conveyed to the husband alone are not to be brought into hotchpot; but that,
2. The lands conveyed to the wife alone, and *a moiety* of those conveyed to the *husband and wife*, are to be brought in.

This was a petition for the partition of the lands of which Joseph Leech died seised, and it presented divers questions relative to advancements in lands, made by the parent to his or her children. The petition stated, that Joseph Leech, formerly of Craven county, had died intestate, seised and possessed of divers tracts of land, therein described; that he left, him surviving, a son named George M. Leech, and two daughters, the petitioner Frances, and Mary Jones Spaight, widow of Richard Dobbs Spaight, on whom descended, as his heirs at law, the lands aforesaid. That the said George M. Leech died intestate, leaving, him surviving, his two sisters, the aforesaid Frances and Mary: that Mary had since died intestate, and all her right, title and interest in the lands, descended upon Richard D. Spaight, Charles G. Spaight, and Margaret E. Spaight; between whom and the petitioners the lands aforesaid were to be divided in equal moieties, viz. one moiety to them and one moiety to the petitioners.

That Joseph Leech, in his life-time, by deeds reciting the respective considerations hereinafter mentioned, did convey sundry other tracts of land, either to his daughter

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Jones v. Spaight.

Mary Jones Spaight and her heirs, or to Richard Dobbs Spaight, her husband, and to his heirs, or to the said Richard and to the said Mary his wife, and their heirs: that is to say, that he, by a deed bearing date the 3d August, 1800, purporting to be made in consideration of the sum of five shillings, conveyed a tract of land containing 640 acres, on the west side of Pedee river, to Richard Dobbs Spaight and his heirs: by deed bearing date the 20th May, 1801, purporting to be made in consideration of the sum of five shillings, he conveyed a tract containing two hundred acres, lying in Craven county, on the south side of Neuse river, to Mary Jones Spaight and her heirs: and by deed bearing date the 11th May, 1801, purporting to be made in consideration of the sum of forty pounds, he also conveyed to the said Mary Jones Spaight and her heirs, a tract containing three hundred acres, lying near to the before described tract. That by deed bearing date the 13th December, 1797, and purporting to be made in consideration of the sum of twenty pounds, he conveyed to the said Richard Dobbs Spaight and his heirs, a tract containing one hundred acres, lying in Craven county, on the west side of Slocumb's creek: that by deed bearing date 21st May, 1794, and purporting to be made in consideration of natural love and affection, and of the sum of five pounds, he conveyed the front of lot No. 24, and the eastern half of lot No. 25, in the town of Newbern, to the said Richard and Mary his wife and their heirs: that by deed dated 18th June, 1795, purporting to be in consideration of one hundred pounds, he conveyed a tract of thirty acres on Trent river, to the said Richard Dobbs Spaight and his heirs: that by deed dated 3d June, 1796, purporting to be in consideration of natural love and affection and the sum of five shillings, he conveyed a tract lying near Newbern, to the said Mary Jones Spaight and her heirs: that by deed dated 4th January, 1797, purporting to be in consideration of natural affection and the sum of five pounds, he conveyed two tracts, one of 70 acres, the other of 60

acres, to the said Mary and her heirs: that by deed dated 12th May, 1792, purporting to be in consideration of love and affection and the sum of five pounds, he conveyed a tract of 76 acres in Craven county, a lot in the town of Newbern, No. 23, and the half of lot No. 25, to the said Richard Dobbs Spaight and to Mary his wife and to their heirs.

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Jones v. Speight.

The petition then charged, that all the said lands were actually and in fact given to the said Mary Jones Spaight and her husband, by way of advancement unto the said Mary, by her father, and that the pecuniary considerations therein stated were never paid nor received, and were only mentioned as a formal circumstance in the execution of the deeds, and that the said lands ought to be brought into hotchpot. The petition prayed that the said lands might be decreed as advancements made unto the said Mary Jones Spaight, and be brought into hotchpot.

The questions arising upon this petition were sent to this Court, and were argued by *Gaston* for the petitioners, and by *Edward Harris* for the heirs of Mary Jones Spaight.

BY THE COURT.—The lands conveyed to the husband alone are not to be brought into hotchpot: those conveyed to the wife alone, and a moiety of those conveyed to her and her husband are to be brought into hotchpot in making partition of the lands of which Joseph Leech died seised.

JULY, 1811.

M'Kenzie and wife
v.
Benj'n Smith, ex'r of Wm. Dry. } From New-Hanover.

Liability of a legatee for interest upon the value of his legacy, to the executor and creditors. The general liability of a legatee to refund, is measured by the value of his legacy; but whether he be liable for interest upon that value, depends upon the particular circumstances of the case.

If he have good reasons to believe that the debt is just, and no dispute exist as to its amount, he ought to contribute his rateable part of the debt immediately upon demand made. If he be guilty of improper delay, he shall be charged with interest.

On hearing the bill and answer in this case, on a motion to dissolve the injunction, it was ordered and decreed, that the injunction be dissolved as to part of the recovery at Law, and that as to the other part, the injunction be retained until further order. It was further ordered, that this case be transmitted to the Supreme Court for decision on the following point: Whether a legatee, to whom a legacy is delivered over by the executor, who does not know that debts exist, shall be liable afterwards to refund the mere value of the property delivered to him, at the value when delivered to him, and no more: or whether the executor, having subsequent notice of existing debts, and giving notice to the legatee thereof, and demanding of him to refund his proportion of the legacy delivered, for the payment of the debts, shall not, on the refusal of the legatee to do so, be entitled to charge the legatee with interest on the value of the property delivered over, from the time of such notice and refusal.

Gaston, for the legatee.—What is the general liability of a legatee to the executor, when he is called upon to refund? It is for the value of the property delivered over, and not for any profits which may have accrued

during his possession of it. In examining this question, some aid may be derived from the different acts of Assembly on the subject. In the act of 1715, ch. 28, the Legislature, in speaking of the extent of the executor's liability, use the words "value of the appraisement," and declare that the legatee shall refund "out of the share received by him." The executor was liable to creditors only to the value of the appraisement: he paid legacies by the appraisement; and if his liability is co-extensive only with the appraisement, why should the liability of a legatee extend further? This construction of the act of 1715, is aided by the act of 1723, ch. 10, which directs that estates of deceased persons shall no longer be appraised, but shall be sold, and an account of the sale returned into the Clerk's office by the executor or administrator, who then becomes liable to the amount of the sale and no further, instead of the amount of the appraisement, as before. This view of the executor's liability is confirmed by the act of 1789, ch. 23, which directs the executor or administrator to distribute the estate within two years after probate of the will, or administration granted, taking from the legatee or next of kin, a bond with security, conditioned for his refunding *his rateable part of any debt or debts truly owing by the deceased, which shall be afterwards sued for and recovered, or otherwise duly made appear.* If the legatee is liable to pay interest, he is in a worse condition than a common bailee: for if by accident he lose his legacy, or it be destroyed, his liability will still continue; whereas a reasonable degree of diligence and care in keeping the property bailed, would excuse him from any liability for the loss or destruction of the property bailed.

Are there any circumstances in this case which alter the general liability of the legatee? The case states, that the executor gave notice of an existing debt, called on the legatee to refund his rateable part, and the legatee refused. The act of 1789 never intended that the

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legatee should be obliged to refund simply upon the demand of the executor; he shall refund "when debts shall be sued for and recovered, or otherwise duly made appear." The difficulty in the case arises from the meaning of the words "duly made appear." Do they mean a mere exhibition of a demand by a creditor? Such a construction would lead to ruinous consequences. A claim will often be unliquidated, so that the executor cannot tell how much is due; doubts may also exist as to the justness of the demand made. It can only be in cases where the justness of the debt and its amount can be made duly to appear, that the legatee is bound to refund upon a mere demand. The case does not state whether the debt, of which the legatee was called on to refund his rateable part, was of this description; and until this fact appear, the Court cannot say whether the legatee has been guilty of any default in not refunding upon the demand of the executor.

A. Henderson, for the executor.—The executor is liable for the assets which come to his hands; and it is immaterial how the assets arise; whether they be the original estate on hand at the death of the testator, or the increase of that estate. He is liable for money out at interest, and the interest which accrues after the testator's death. He is liable for the slaves on hand at the death, and their increase afterwards, and also for the hire of the slaves up to the time that he delivers them to the legatee. The liability of the executor is not confined to the increase of the estate up to the time of delivering it over; for the act of 1789 only intended to benefit the legatee, by enabling him to get his legacy earlier: it did not intend to impair the rights of creditors. How stood the rights of creditors before 1789? Surely their rights and the executor's liability were co-extensive with the estate out of which their claims were to be satisfied.

But whatever general rule the Court may think proper to adopt in relation to this subject, the legatee in this case must be liable for interest. Here he was duly notified of the debt, called upon to refund, and he refused. If a suit is to be brought where the executor acknowledges the justness of the debt, and has no wish to resist its payment, who shall suffer the consequences? Not the executor; he is in no fault, he has no assets. He shall suffer who is in fault, and that is the legatee; for he has the assets, and he has notice of a debt which is to be satisfied out of the assets.

BY THE COURT.—The general liability of a legatee to refund is measured by the value of his legacy; but whether he shall be chargeable with interest upon that value, or upon any part thereof, for not refunding when he has notice from the executor of existing debts, and he is called upon to refund his rateable part, and he refuses, must necessarily depend upon the particular circumstances of the case. If he has good reason to believe that the debt is just, and there be no dispute as to its amount, he ought to contribute his rateable part immediately upon demand made: and if the executor take from him no refunding bond, still he ought to contribute with the same promptitude as if he had given a bond; for here he is to contribute for the relief of the executor, from whom the creditor exacts his debt *de bonis propriis*. The refunding bond is given for the benefit and ease of the executor, that after two years creditors may be turned over to the legatees for their money: and as in cases where no bond is given, the executor shall recover interest if the legatee be guilty of improper delay in refunding his rateable part of the debt, so in cases where a bond is given, there seems to be no good reason why the creditor shall not have interest, if the legatee has been guilty of such delay. But the circumstances of each case must be looked to, in deciding whether the legatee

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shall be chargeable with interest. It does not appear in the case before the Court, what were the circumstances attending the debt, nor whether those circumstances were made known to the legatee when the executor gave him notice of the debt and called upon him to refund. It is surely not a general rule, that a legatee shall pay interest; and there not appearing in this case any peculiar circumstances to charge him, judgment must be entered in his favour upon the point sent to this Court.